In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
JAMES T. BARBER, SUMNER G. MOON, et al. } No. 444.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

I.

This court has jurisdiction of the case.

Appellee in his reply brief does not seriously contest the contention that the plea of the statute of limitations is ordinarily a plea in bar and not a plea in abatement, but he insists that this case should be an exception to the general rule because:

First. *The plea was treated by the parties and by the court below as a plea in abatement.*

This, however, can not alter or change the nature of the plea. The effect of sustaining the plea was precisely the same as if it had been properly designated

a plea in bar. There was no agreement between the parties that it might be treated as a plea in abatement; and as it is, in fact, a plea in bar, it is doubtful whether the court should or could treat it as a plea in abatement, though a positive agreement to that effect had been entered into between counsel. The jurisdiction of this court to review this case is expressly given by act of Congress, and it can not be deprived of its jurisdiction by agreement of counsel.

Second. *Under section 5440, Revised Statutes, it is necessary to allege an overt act.*

It can not be perceived how the fact that it is essential under this section to allege the commission of an overt act in pursuance of the conspiracy can alter the nature of the plea of the statute of limitations. In an indictment for conspiracy at common law it is unnecessary to allege an overt act, and in such cases the statute of limitations begins to run from the date of the offense.

Against an offense committed under section 5440 the statute of limitations does not run from the formation of the conspiracy but from the commission of the overt act, because no prosecution can be had until such event occurs. But when the three years have expired after the commission of the overt act (not considering here the effect of a subsequent overt act) the prosecution is barred; and the effect is precisely the same as where the statute runs from the commission of the offense, that is, not merely are the proceedings subject to abatement, but the Govern-

ment's right of prosecution is destroyed, and the accused is no more liable to punishment than if he had never committed the offense.

Inasmuch as a demurrer was interposed by defendants to the fourth count of the indictment (R., p. 36) and as the court below decided the case upon the sufficiency of the indictment, precisely the same as if a demurrer raising the question of the bar of the statute were permissible and was sustained, the case will be here treated in like manner.

II.

It was error for the court below to hold that the object of the conspiracy alleged in the indictment was accomplished when the title to the lands described in the indictment was divested out of the United States, and that no overt act thereafter committed was in furtherance of any unlawful object embraced in the conspiracy.

To determine the correctness of the court's ruling upon this question, it is necessary to fully understand the scope of the conspiracy and the nature of the overt acts alleged in the fourth count of the indictment. It is therein alleged that the defendants conspired with certain other persons—

> * * * knowingly, wickedly, falsely, and corruptly to defraud the United States of America out of the possession and use of and title to divers large tracts of timber lands of the United States * * * with the intent and purpose unlawfully *to obtain the title to said lands for the use, benefit, and profit of themselves and a certain corporation thereafter to be*

> *organized, and organized, to wit, the Barber Lumber Company,* a corporation organized under the laws of the State of Wisconsin and doing business in the State of Idaho, with an office and agent at the city of Boise in the said State *and ultimately to obtain the transfer of the title to said lands to said corporation, by unlawfully, willfully, and corruptly soliciting, inducing, and procuring a large number of persons to apply for and enter said lands under the laws of the United States relating to the purchase and sale of the public timber lands of the United States * * * for the use and benefit of said James T. Barber, Summer G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, and Patrick Downs, and said corporation.*

And the methods by which the object of the conspiracy was to be accomplished are fully described.

And it is alleged that in furtherance of the conspiracy the eleven overt acts, described in the indictment, were committed.

The first two of these overt acts consisted in procuring a large number of persons, whose names are given, to make applications for various tracts of land and final proofs therefor, but it appears that neither the applications nor proofs mentioned in the indictment (R., p. 18–21) were made within three years before April 14, 1908, the day upon which the indictment was filed.

The third overt act alleged really consisted of numerous overt acts. It is there alleged that the

conspirators unlawfully solicited, induced, and procured the various persons mentioned to convey either to Albert E. Palmer, or George S. Long, or Horace S. Rand all their interests in and title to the lands theretofore described. Of course the execution of a conveyance by each separate individual was within itself an overt act.

It is important to note that no date whatever is given as to when either of these conveyances was executed; that is, when these several overt acts were committed. Consequently the indictment fails to show on its face whether they were or were not committed within the three years next before the finding of the indictment.

It was assumed by counsel in argument that the phrase "thereafter, to wit, on the tenth day of April in the year nineteen hundred and five," used in alleging the next succeeding overt act shows that these conveyances were executed before that date. This assumption is erroneous. The word "thereafter" refers to the formation of the conspiracy, and not to the commission of the overt act next before alleged. The same expression is used in describing each overt act; and it will be noted that the ninth overt act is alleged to have been committed on July 5, 1905, while the date of the eighth was January 2, 1906, and a similar relation exists between the ninth and tenth overt acts.

As to the fourth overt act, it is alleged that on the 10th day of April, 1905, the conspirators induced George S. Long to execute and deliver a deed of conveyance to the Barber Lumber Company for a num-

ber of quarter and half sections, which are particularly described. This occurred three years and four days before the finding of the indictment; and it may be assumed that the deeds from the parties who conveyed the lands entered by them to Long were executed prior to that date.

As to the fifth overt act, it is alleged that on the *27th day of May, 1905*, the conspirators induced Albert E. Palmer to convey to the Barber Lumber Company numerous tracts of land, which appear by a comparison with the list of tracts previously set out in the indictment to have been tracts that had been entered by various parties under the conspiracy alleged.

As to the sixth overt act, it is alleged that a conveyance at the instance of the conspirators was executed by Palmer to the Barber Lumber Company on the *28th day of June, 1905*, for a few additional tracts of land which had also been entered under the conspiracy.

As to the seventh overt act, it is alleged that a conveyance was executed by Palmer on *January 2, 1906*, at the instance of the conspirators for a few other tracts that had been entered under the conspiracy.

As to the tenth overt act, it is alleged that on *July 7, 1905*, at the instance of the conspirators, Horace S. Rand executed a conveyance to the Barber Lumber Company for certain tracts of land which had previously been fraudulently entered

under the conspiracy, the total acreage being 15,496.65 acres.

It therefore appears in the face of the indictment that the titles to the lands which had been previously conveyed by the fraudulent enterers to Albert E. Palmer and Horace S. Rand were transferred by them to the Barber Lumber Company within *three years before the finding of the indictment. And, furthermore, there is nothing in the indictment which shows that the title had been divested out of the several entrymen who executed the conveyances to Palmer and Rand before April 14, 1905.*

Consequently, under this record, it must be treated as if such interests in these lands as had been acquired by the several entrymen, who subsequently conveyed them to Palmer and Rand, remained in them up to a time within three years before the finding of the indictment.

Therefore the question is whether the execution of the numerous conveyances, by the several fraudulent entrymen, to Palmer and Rand, by which the titles to these lands were vested in two individuals, were in furtherance of the unlawful conspiracy, and further whether the conveyances subsequently executed by Palmer and Rand to the Barber Lumber Company, by which they were further united by being vested in one individual, were likewise in furtherance of such conspiracy.

The court below held that the "Object of the conspiracy charged was to defraud the United States out of its land. This was accomplished when the

title passed from the Government. The subsequent conveyances from successors in interest of the entrymen to the Barber Lumber Company could not, by any possibility, have been done to effect the object of the original conspiracy" (memorandum Op.).

In this holding it is submitted that the court took an entirely erroneous view of the statute upon which this indictment rests, one which has been expressly repudiated by this court. The nature of a conspiracy of this character, and in what the fraud against the Government consists, and whether such a conspiracy to defraud is a criminal offense, was fully considered by this court in the case of *United States* v. *Keitel* (211 U. S., 370); and it is submitted that the principles decided in that case conclusively determine that the conclusion reached by the court below in this case is incorrect.

The *Keitel* case involved the fraudulent procuring of title to certain coal lands under sections 2348, 2349, 2310, Revised Statutes. By those sections more than one entry by the same person or association of persons was prohibited.

The indictment in the present case was found under the Timber and Stone Act of June 3, 1878 (Chap. 151, 20 Stat., 89), as amended by the act of August 4, 1892 (Chap. 375, 27 Stat., 348), which reads as follows:

> That surveyed public lands of the United States valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be

> sold to citizens of the United States, or persons who have declared their intention to become such, *in quantities not exceeding one hundred and sixty acres to any one person or association of persons* at the minimum price of two dollars and fifty cents per acre.

The second section provides that the person desiring to avail himself of the provisions of the act shall file with the register a written statement, which among other things must state—

> * * * that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

Therefore the statutes upon which the two cases were predicated are in effect the same.

While the indictments in the two cases differ somewhat in form, yet in substance they are the same. In the *Keitel* indictment, after alleging that the defendants conspired to make false and fictitious entries and to make fraudulent representations to the registrar of the land office, and to deceitfully cause him and the Commissioner of the Land Office to act otherwise than they would, had they not been deceived, and to furnish entrymen with money necessary to make the payments required, it was further charged that—

> * * * thereby the said defendants unlawfully, corruptly, willfully, and knowingly did conspire, combine, confederate, and agree together, and with their said agents, and said divers other persons to the grand jurors unknown, by means of said false, fictitious, illegal, feigned, untrue, forged, and fraudulent entries and filings hereinabove referred to, indirectly, deceitfully, and fraudulently *to obtain for themselves and the said corporation from the said United States certain of the public lands and property of the said United States above referred to, in quantity greatly in excess of that which either or any or all of the said defendants and said corporation would lawfully be allowed to obtain directly from the United States under a lawful administration of the said laws and regulations and by means of legal and valid entries of said lands, and in that manner to defraud the said United States of*

> *its valuable property in such lands, and also of its governmental function in the matter of preserving and disposing of the said lands, as well as out of its right to administer an intelligent and honest service in that behalf in the interests of the people of the said United States.*

It is true that the manner in which the United States would be defrauded by the acquiring of title by the conspirators is described a little more fully in this indictment than in the indictment in the case at bar, but the variance is wholly immaterial, as will be made to appear in the development of the argument, and, moreover, the case is not here on the sufficiency of the indictment in this particular, and the question will not be considered by this court. What this court considered as the essential features of the indictment in the *Keitel* case, and wherein the conspiracy therein described was unlawful, is stated with clearness and force in the opinion of the court, the most important parts of which are as follows:

> * * * The first count charged that the eleven defendants illegally conspired, in violation of section 5440, Revised Statutes, with certain named persons and others unknown *to illegally obtain the title of certain coal lands belonging to the United States.* The conspiracy was to be effected by procuring various persons as agents to enter coal lands in their own name, ostensibly for their own benefit but in reality for the use and benefit of the accused and a named organization; the purchases being made by the agents as above stated, not with their own money, but with money of the ac-

cused or the corporation *and under agreements to convey the title, when acquired, to the accused or to the corporation, thus enabling the accused and the corporation to obtain coal lands belonging to the United States in excess of the quantity which they were allowed by law to enter.*

* * * * *

Under these sections the question is, Do they prohibit a person who is disqualified from acquiring additional coal lands from the United States, because he has already purchased the full quantity permitted by law, from employing one, who would be qualified if he made any entry of coal land, in his own behalf, to make such entry ostensibly for himself but really as agent for the disqualified principal to pay for the land with money of such principal under the obligation, *when the title has been obtained by purchasing from the United States, to turn over the land purchased to the concealed and disqualified principal? That the statute does expressly prohibit such a transaction we think is foreclosed by a previous decision of this court.*

* * * * *

The express command that the preceding sections shall be held to authorize only one entry by the same person or association of persons causes the grant to purchase not to embrace more than one entry by the same person, and as the right to purchase the coal land did not exist except by the authority conferred by the statute, it follows that the express provision excluding the right to do a particular act is both in form and substance a

prohibition against the doing of such act. To hold that this prohibition does not exclude the existence in a disqualified person of a power to employ an agent to make a second entry, to furnish him with the money to pay for the land, *under an obligation when he has bought from the United States to transfer the land to the disqualified person*, would require us to say that the power was given to do that which the statute, in express terms, declares shall not be done. In other words, it would compel us to decide that an act done for a disqualified person by an agent acting for him and for his exclusive benefit was not the act of the disqualified principal. But this would be to nullify the prohibition upon the inconceivable hypothesis that the act of a duly authorized agent was not the act of his principal. To escape this impossible result it is insisted in argument that where a person qualified to purchase buys in his own name without disclosing that he is a mere agent for a disqualified person, as he, the agent, thereby exhausts his individual right, the purchase must be treated as his and not that of the undisclosed principal. This, however, does not change the situation, but simply seeks to avoid it by the statement of a distinction without a difference, since it again but reads the prohibition out of the statute by causing it to be inoperative if the disqualified person elects to do by another, his agent, that which the statute forbids him to do. True, the statute imposes no limitation on the right of a purchaser who has acquired coal land from the United States

to sell the same after he has become the owner of the land. The absence, however, of a limitation on the power to sell after acquisition affords no ground for saying that the express prohibition of the statute against more than one entry by the same person should not be enforced according to its plain meaning. This clearly follows since the right to sell that which one has lawfully acquired neither directly nor indirectly implies *the authority to unlawfully acquire in violation of an express prohibition* (pp. 387, 388).

* * * * *

The unsoundness of the argument that as when the prohibited entries were made the price of the lands was paid to the United States, therefore the United States could not have been defrauded, is refuted by its mere statement. If it were true, then in every case, however flagrant, where the lands of the United States *were procured* in violation of express prohibitions of law, the element of fraud would cease to exist by the mere payment of the price; that is to say, the successful operation of the fraud would deprive the transaction of its fraudulent character. But the inherent weakness of the contention need not be further pointed out, because its want of merit is conclusively established by the ruling in *Hyde* v. *Shine*, where a like contention was decided to be without foundation.

The attempt to distinguish this case from *Hyde* v. *Shine*, upon the theory that there the parties obtaining the land were disquali-

fied whilst in this they were not, rests upon the misconstruction of the coal land statutes which we have already pointed out, a misconstruction which we have seen led the court, in its ultimate conclusion, erroneously to say that the entrymen who acted as the agents of the disqualified persons or corporation were not forbidden by the statute to act as they did, because they might have made an entry for themselves.

Nor do we deem it necessary to do more than briefly refer to the elaborate statements at bar concerning constructive crimes and the fear which also found expression in the opinion below, that if the words to defraud in any manner or for any purpose receive a broad significance charges of crime may be hereafter predicated upon acts not prohibited and innocuous in and of themselves and which, when they were committed, might have been deemed by no one to afford the basis of a criminal prosecution. It will be time enough to consider such forebodings when a case arises indicating that the dread is real and not imaginary. That they are mere phantoms when applied to the case here presented results from the obvious consideration that the conspiracy charged had for its purpose the doing of acts which were in clear violation of the direct prohibition of the coal-land laws, a prohibition whose meaning and effect had been unmistakably announced and applied by a decision of this court rendered many years before the formation of the conspiracy here

> charged. *The cogency of these considerations becomes more pointedly manifest when it is borne in mind that the purpose and necessary effect of the conspiracy complained of was to obtain the lands of the United States by the suppression of facts which, had they been disclosed, would have rendered the acquisition impossible* (pp. 394–395).

It will be observed that the court considered the very gist of this conspiracy to consist, not in the purpose to divest the title to the lands out of the Government, but in the design to have the title vested in the corporation which it was intended under the conspiracy should eventually take the title thereto; and that the divestiture of title out of the Government was only one step in the unlawful scheme, which had its consummation in the vestiture of the title in the corporation.

The same view had been previously taken by this court in *United States* v. *Trinidad Coal Co.* (137 U. S., 160, 166), which was an action in equity to set aside patents for lands which had been procured from the Government under a similar scheme, and in which the court said:

> It is contended that the case made by the bill is not within the prohibitions of the statute, although the demurrer admits that the Trinidad Coal and Coking Company acquired the lands in dispute pursuant to a scheme whereby the several tracts were to be entered for its benefit, in the name of certain persons, its officers, stockholders, and em-

ployees—the title, when thus obtained, to be conveyed to the company, which should, and did, bear all the expenses attending the entries and purchases from the Government. This contention can not be sustained unless the court lends its aid to make successful a mere device to evade the statute. The policy adopted for disposing of the vacant coal lands of the United States should not be frustrated in this way. It was for Congress to prescribe the conditions under which individuals and associations of individuals might acquire these lands, and its intention should not be defeated by a narrow construction of the statute. If the scheme described in the bill be upheld as consistent with the statute it is easy to see that the prohibition upon an association entering more than three hundred and twenty acres, or entering or holding additional coal lands, where one of its members has taken the benefit of its provisions, would be of no value whatever. * * *

There is, consequently in view of all the allegations of the bill, no escape from the conclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained, because if the facts admitted by the demurrer had been set out in the papers filed in the land office the patent sought to be canceled could not have been issued without violating the statute. The defendant would not have been permitted to do indirectly that which it could not do directly.

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A like principle was declared in *Hyde* v. *Shine* (199 U. S., 62, 82) wherein the court said:

> * * * Whatever may be the rule in equity as to the necessity of proving an actual loss or damage to the plaintiff, we think a case is made out under this statute by proof of a conspiracy to defraud and the commission of an overt act, notwithstanding the United States may have received a consideration for the lands and suffered no pecuniary loss. (*MacLaren* v. *Cochran*, 44 Minn., 255.) The law punishes the false practices by which the lands were *obtained*, and the question whether the Government stands in the position of a bona fide purchaser with respect to the school lands is not one which can be litigated in a criminal prosecution for a violation of law.
>
> Even if the United States were in a position to claim the rights of a bona fide purchaser to the state lands, the methods by which these lands were acquired from the States, and the lands in exchange therefor *procured* from the United States, would be none the less a fraud of which the latter might take advantage in a criminal prosecution. The indictment under section 5440 charges a conspiracy to defraud the United States out of the possession, use of, and title thereto of divers large tracts of public lands, and if the title to these lands *were obtained* by fraudulent practices and in pursuance of a fraudulent design, it is none the less within the statute, though the United States might succeed in defeating a recovery of the state lands by setting up the rights of a bona fide purchaser. Under the circumstances

> it can not be doubted that the United States might maintain a bill to cancel the patents to the exchanged lands procured by these fraudulent means, notwithstanding its title to the forest reserve lands might be good.

In fact the statutes under which the indictments in these several cases were found can admit of no other interpretation.

There can be no doubt under these and other authorities that the conspiracy set out in the indictment was an unlawful one, and the question here under consideration can be easily answered by ascertaining what made it unlawful. There is nothing in the indictment tending to show that either of the persons who made the entries had ever before exercised that right, or was in any way disqualified from making them. Then it was not unlawful for them to make the entries or the final proofs, or to take title to the land, or even to obtain money for that purpose from the defendants; nor was it unlawful for defendants to conspire to induce them to make such entries and proofs, and thus to acquire the title, and to furnish them money for that purpose. Suppose this indictment had stopped in its allegations at that point, alleging only a conspiracy to induce these several persons to make entries and final proofs, and thereby procure title to the lands from the Government, and to furnish them money for that purpose, could it be seriously contended that it would be sufficient? Then what is it that made the whole transaction from beginning to end fraudulent and unlawful, and the conspiracy to carry

the plans into effect a criminal offense? *But one thing, and that was the purpose to unite the title to these lands in one individual. With that element eliminated, the scheme was a lawful one; with that present, the scheme was a crime. Consequently, the very overt acts, the contemplation of which made the conspiracy an unlawful agreement, and an offense denounced by the statute, were the very ones which were committed within three years before the finding of the indictment.* Can it be possible that these overt acts upon which the illegality of the whole transaction rested, which would enable the Government to have the titles to the various tracts canceled for fraud and the conspirators subjected to imprisonment, were not committed in furtherance of the conspiracy, and in its consummation?

The court below, and the Circuit Court of Appeals in the *Lonabaugh* case (179 Fed., 476), which will be hereafter specially considered, have entirely mistaken the true nature of the fraud perpetrated upon the Government by schemes of this character. They have treated it as a mere matter of dollars and cents, and have therefore considered that when the Government parted with the title to its property the fraudulent transaction had been consummated. But the mere parting with the title is a very insignificant part of the fraud. In fact, from a pecuniary standpoint, the Government was not defrauded in the least, because the indictment is drawn upon the theory that every cent to which the Government was entitled for the lands was paid by the enterers. And of what mate-

rial interest can the pittance which is paid per acre for those lands be to the Government? As is clearly shown by the foregoing authorities, the gist of the fraud consisted in the defeat of the policy adopted by Congress with reference to the disposition of these lands. They were held in trust by the Government for the use and benefit of its citizens; and it was thought by Congress that the public welfare would be best conserved by dividing these lands into small tracts and thus distributing them among its citizens. But by these fraudulent schemes this design was, as to the large bodies of lands involved in them, entirely defeated. The fact is especially emphasized that, so far as the indictment shows, up to within three years before its return, the titles to from one-half to two-thirds of the tracts of lands entered remained in the individual entrymen, and that the policy declared by Congress had not as to them been violated. In fact, if the several entrymen had at that time repudiated the unlawful scheme and refused to convey the lands in accordance therewith, the only ground upon which the United States could have had the patents canceled was that they had been issued on a false affidavit, because up to that time there had been no violation of the Government's policy, and consequently no fraud had been perpetrated upon the Government. Certainly, then, the execution of the conveyances by which these tracts of land were first consolidated and the policy of Congress was first violated was in furtherance of the unlawful object of the conspiracy. But we insist that every act by which the legislative

intent was further violated by a consolidation of large bodies of land in the hands of one individual, is equally obnoxious to the laws, and must be considered as an overt act in furtherance of the conspiracy when such act was contemplated by the conspirators.

The fact that the conspiracy was formed for the purpose of depriving the Government, by fradulent means, of its power to carry out a policy or to exercise a governmental function, and not to defraud it of money or property, is no ground of defense. If this question were an open one when the case of *Haas* v. *Henkel* (216 U. S., 462,479) was submitted to this court, it was there conclusively settled in favor of the Government. Haas and Holmes, an official of the Department of Agriculture, and others were indicted under section 5440, Revised Statutes, the object of the conspiracy being to defraud the Government by false manipulation of the government reports as to cotton crops; and the conclusions that the court reached with reference thereto is thus stated:

> These counts do not expressly charge that the conspiracy included any direct pecuniary loss to the United States, but as it is averred that the acquiring of the information and its intelligent computation, with deductions, comparisons, and explanations, involved great expense, it is clear that practices of this kind would deprive these reports of most of their value to the public and degrade the department in general estimation, and that there would be a real financial loss. But it is not

> essential that such a conspiracy shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government. Assuming, as we have—for it has not been challenged—that this statistical side of the Department of Agriculture is the exercise of a function within the purview of the Constitution, it must follow that any conspiracy which is calculated to obstruct or impair its efficiency and destroy the value of its operations and reports as fair, impartial, and reasonably accurate would be to defraud the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation. That it is not essential to charge or prove an actual financial or property loss to make a case under the statute has been more than once ruled. (*Hyde* v. *Shine*, 199 U. S., 62, 81; *United States* v. *Keitel*, 211 U. S., 370, 394; *Curley* v. *United States*, 130 Fed. Rep., 1; *McGregor* v. *United States*, 134 Fed. Rep., 195.)

It may be insisted that the indictment in this case is fatally defective because it does not allege that the conspiracy was formed for the purpose of defrauding the United States in the exercise of a governmental function; but, as above stated, this question was not raised in the court below, and was not passed on by that court. Furthermore, no such allegation is necessary, because the indictment charges every

essential fact necessary to show that the conspiracy was an unlawful one, and the nature of the fraud that would result to the Government should it be carried out.

The case of *Lonabaugh* v. *United States* (179 Fed., 476, 479, 481), which was recently decided by the Circuit Court of Appeals, Eighth Circuit, involved an indictment which in many respects was similar to the indictment in this case; and that court took the view held by the court below in the present case; and the grounds upon which it is insisted that conveyances executed subsequently to the issuance of the patents and by which the conspiracy is consummated by uniting the titles in one person, are not overt acts committed in furtherance of the unlawful object of the conspiracy are clearly set forth in the opinion of the court in that case in the following language:

> * * * The subsequent acts (to the issuance of the patents) are not open to the same objection, for they were the acts of one or more of the conspirators. But were they done to effect the object of the conspiracy; *that is, to defraud the United States of the possession and title?* This depends upon whether or not that object had been effected before those acts were done. If it had, the answer must be in the negative, because of the obvious inconsistency in treating an object already effected as still requiring something to be done to effect it. As to the possession, it is enough to say that it passed from the United States when the entries were secured; and as to the

right of possession, it is enough to say that it passed from the United States in a qualified sense when the entries were secured and passed unqualifiedly with the title. When, then, did the title pass from the United States? * * *

But it is contended that the conspiracy was not limited to the defrauding of the United States of the lands, but included the transfer of them to the corporation, and that until both of these things were done the object of the conspiracy was not effected. Passing the question of whether or not the indictment charges the object of the conspiracy so broadly, and treating the evidence as sufficient in that regard, we come at once to test the contention in the light of the statute. Section 5440 does not interdict all conspiracies, but only those whose object is "either to commit any offense against the United States or to defraud the United States in any manner or for any purpose," and then only when one or more of the conspirators do some "act to effect the object of the conspiracy." It is not enough that the conspiracy be directed to the attainment of some unlawful object, or to the attainment of some lawful object by unlawful means; it must be directed to the attainment of one of the objects specified. Nor is it enough that the overt act be directed to the attainment of some other object; *it must be directed to the attainment of the object which brings the conspiracy within the interdiction; and when that object is attained "the object of the conspiracy," in the sense of the statute, is*

> *effected.* In this view of the statute the contention must fail. The conspiracy came within the interdiction because it had for one of its objects the defrauding of the United States of certain of its public lands, *and that object was effected when, as a result of the deceit practiced upon the officers of the land department, the lands were patented to entrymen who were not entitled to them, considering the antecedent agreement or obligation in pursuance of which the entries were secured.*

The view here expressed is, it is submitted, wholly unwarranted by the statutes, and, as above shown, is in direct conflict with the holding of this court in *United States* v. *Keitel.* As appears in the last expression of the court above quoted, the decision rests upon the assumption that the object of the conspiracy, to wit, the defrauding of the United States, was effected when the lands were patented to entrymen who were not entitled to them, because of the antecedent agreement or obligation in pursuance of which the entries were secured; when, as a matter of fact, *this was only one step in the fraudulent scheme, and not the most important step, as it within itself was not unlawful, but became so solely because of the prior agreement that subsequent conveyances would be executed by which the title should be vested in one individual, and by the execution of such deeds in pursuance of the agreement.*

If the conspiracy set forth in the indictment were of such character, that acts which occurred beyond a certain point in carrying out the conspiracy were not

denounced by the statute, and were not in themselves unlawful or designed to bring about and aided in bringing about an unlawful condition, then the reasoning of the court in the *Lonabaugh* case would be sound. But such is not the case, and every act in the scheme from the first step in making the entry to vesting title in the lumber company was a material one in consummating the unlawful purposes of the conspiracy.

III.

The commission of an overt act in furtherance of a conspiracy made criminal by section 5440, Revised Statutes, within three years before the finding of an indictment for such conspiracy, prevents the the bar of the statute of limitation, though such conspiracy may have been formed and other overt acts committed more than three years prior to the return of the indictment.

First. *Views of United States courts with reference to effect of overt act upon the running of the statute of limitation against the offense of conspiracy under section 5440, Revised Statutes.*

Apparently this court has not yet had before it this exact question for determination, though it has been considered and decided by a number of the lower United States courts. The conclusions reached by them, and especially the reasons assigned in support of their conclusions, are very diverse; and for the convenience of the court the reasoning of each of the several courts who have considered the question is here given, the first quotations being taken from opinions in which it was held that the action was

barred at the expiration of three years from the first overt act.

In *United States* v. *Owen* (32 Fed., 534, 537, 538), District Judge Deady said:

> In support of the prosecution it is contended that the crime was not completed until the commission of the last acts done in pursuance of the conspiracy; and that as the filing of the false description by Owen, on December 22, 1884, and the making and using the alleged forged affidavits by Barnhart, in September and October of the same year, each took place within the three years immediately preceding the finding of the indictment, the prosecution is not barred. In this respect it is likened to or said to be a continuous crime. No authority is cited for the proposition and, on general principles, I think it can not be maintained.
>
> An instantaneous crime, such as arson or killing, is consummated when the act is completed. A continuous crime, such as carrying concealed weapons, endures after the period of consummation. In the former case the statute of limitations begins to run with the consummation, while in the latter it only begins with the cessation of the criminal conduct or act. But even then it is a bar to a prosecution for any act or part of the continuous crime which occurred three years prior to such time.
>
> As has been said, this crime consists, not in a continuous series of acts, constituting what may be called a habit, but of two distinct

> things only—a conspiracy and an act done in pursuance thereof at any time thereafter. But admitting this is a continuous crime, the demurrer must be sustained on this point. That being the case, the prosecution of the defendants for any act committed three years before the finding of the indictment is barred by lapse of time, and those alleged to have been committed within three years of such finding are not sufficient to constitute the crime defined by the statute. The very foundation of the crime—the conspiracy—is shut out, and without this circumstance the offense in question is not charged in the indictment. However, this is an instantaneous crime, composed of the conspiracy and the first act done to effect the object thereof, at whatever distance of time therefrom. When the conspiracy is formed the crime is begun, and when the act is committed it is consummated. An indictment will then lie against the criminal, and the limitation on the right of the Government to prosecute him begins to run, and in three years the bar is complete.

In *United States* v. *McCord* (72 Fed., 159, 164, 165) District Judge Bunn, in charging the jury, said:

> I have no doubt that the statute of limitations has stood in the way of this prosecution from the first, and that counsel for the Government have felt the difficulty. They admit that the indictments may properly have been found in March, 1891; that the conspiracy to defraud the Government was then formed by the defendants, and various overt acts

performed intended to effectuate its objects. If this be so it is difficult to see why the statute did not then begin to run. Otherwise you would have a different period of limitation in conspiracies from what you have in other offenses against the Government, which could not have been the intention of the law. The purpose evidently was to make a uniform rule, applicable to all offenses of the same grade. Counsel no doubt anticipated this difficulty and sought to avoid it by alleging an overt act committed on October 23, 1891, so as to avoid the claim of the running of the statute. Now, to make good this contention, it is claimed that a conspiracy is a continuing offense. No doubt a conspiracy is a continuing offense in this sense, that whenever an individual comes into the conspiracy, however late, he is considered as adopting all the previous acts of his co-conspirators, and is liable in the same degree with them. But that it is a continuing offense in the sense that, as to the first and original parties to the conspiracy, this statute begins to run anew from the time of the commission of every overt act, is a contention that the court is unable to affirm. It may be true that, as to Murray, who it is alleged was brought in to homestead a quarter section on October 23, 1891, the statute would not begin to run until he became a party to the conspiracy. The court does not decide that question, because it is not before the court, Murray not being on trial; but as to the defendants whom the evidence for the prosecution is directed to show originated the conspiracy in March

> and April, 1891, and committed overt acts to effectuate its object, it seems pretty clear that the statute began to run from the time the first overt act was committed, some three years and eight months previous to the finding of the indictment. They would, of course, still be liable to prosecution for any distinct illegal act, like causing an entry to be made contrary to law, by which the Government was defrauded, or procuring false affidavits to be made. The statute would run upon such distinct acts from the time of their commission, independent of when the conspiracy was originated and formed.

This reasoning was adopted by Judge Lewis in *United States* v. *Biggs* (157 Fed., 273).

In *Ex parte Black* (147 Fed., 832, 837, 841) District Judge Quarles said:

> It is contended on the part of the Government that this was a so-called continuing crime. Conceding for the purposes of the arrgument that a conspiracy may, under certain circumstances, be recognized as a continuing crime, what fact or feature is there here to bring this case within such a classification? Here the conspiracy was confined to a single undertaking limited to particular descriptions of land, and completed within six months. The entrymen were handled like a drilled squad, and transported from place to place, taking the several necessary steps which culminated on the 17th day of March, 1903. No effort was made to enlarge the original conspiracy to embrace any other lands, or adapt it to any

> further or different transaction. In the Green-Gaynor case (*United States* v. *Green* (D. C.), 115 Fed., 349; *Greene* v. *Henkel*, 183 U. S., 251; 22 Sup. Ct., 218, 46 L. Ed., 177) the conspiracy was formed in 1891. From year to year the old conspiracy was adapted to new contracts, whereby the Government was defrauded; and in 1897 it was revived as to certain new government contracts. There might be some reason for treating that as a continuing offense which was revived afresh with each new contract. But there is no well-reasoned case to which my attention has been called which justifies the doctrine that in every case of conspiracy the statute begins to run from the last overt act instead of the first. In cases of that nature the doctrine of *Commonwealth* v. *Bartilson* (85 Pa., 482) and *Insurance Company* v. *State* (75 Miss., 24; 22 South, 99) is the more sane and reasonable. If the illicit scheme is continued and new overt acts to carry it out occur within the period of limitation, the pleader should charge a new conspiracy and the jury may be warranted from all the evidence in finding the existence of such new offense within that period.

This case on appeal was affirmed by the Circuit Court of Appeals, Seventh Circuit, on the ground that the conspiracy had been completed more than three years before the finding of the indictment, and the court did not pass upon the effect on the running of the statute of overt acts committed within the three years.

The courts who have held that an overt act committed within the statutory period prevents the bar of the statute have expressed their views as follows:

In *United States* v. *Bradford* (148 Fed., 413, 417, 418) Judge Parlange considered the question at length, saying:

> At common law the conspiracy alone constitutes the offense, without any overt act, and the conspirators can be prosecuted from the instant the conspiracy is formed. But under Revised Statutes, section 5440, no conspiracy can be prosecuted until an overt act is committed. I am fully aware of the statements found in the decisions to the effect that under Revised Statutes, section 5440, the gist of the offense is the conspiracy, and that the overt act is no part of the offense. Mr. Justice Woods so stated in *United States* v. *Britton* (108 U. S., 204; 2 Sup. Ct., 534; 27 L. Ed., 698). It may be interesting to notice in passing that it seems the same learned jurist had previously held the reverse in *United States* v. *Dennee* (3 Woods, 50; Fed. Case No. 14948). But those statements have never been made with regard to or as affecting the question of the statute of limitations here presented. I agree fully that the overt act is not an element of the offense in the sense in which in criminal law a specific criminal intent, for instance, is an ingredient of an offense. Such ingredients are, as I believe, always culpable per se; whereas the overt act may be per se, and, considered independently of the conspiracy, a perfectly innocent act. But the indisputable

fact remains that an offense under Rev. Stat. 5440 can not be prosecuted until an overt act is committed. A criminal offense against the sovereign, which he can not prosecute and punish, is, it seems to me, a matter which the legal mind can not grasp. It is plain, then, that the statute of limitations is not set in motion by the forming of the conspiracy, but that the moment the conspiracy is formed and an overt act is committed by one of the conspirators to effect the purpose of the conspiracy, that moment the offense can be prosecuted and the statute of limitations begins to run as regards that conspiracy and that particular overt act. But I am absolutely unable to agree that if, after committing the first overt act, the conspirators do nothing more for three years, and they are not prosecuted within that time, they can thereafter continue the conspiracy, or renew it either publicly or secretly and as often as they please, and that they can commit as many acts as they choose to effect the object of the conspiracy, and yet have absolute immunity from prosecution for the conspiracy. It is well settled, as I have already said, that the overt act need not itself be an offense. It might therefore be absolutely noncriminal per se, and, being such, it could not attract the attention or arouse the suspicion of the Government. That immunity from prosecution for the conspiracy would result from the lapse of three years after the commission of the first overt act, although the conspiracy was thereafter continued or repeatedly renewed, and many other overt acts committed

under it, is, to my mind, an utterly irrational conclusion, which the law could never have contemplated.

It was said during the trial that my view would lead to the conclusion that for the same offense persons might be subjected to many prosecutions. But this is entirely incorrect. While the conspiracy per se might be the same, yet if the conspirators chose to renew it, or to continue it in existence, and to commit new overt acts to carry it out, the conditions under which the right of the Government to prosecute would arise would be different every time a new overt act was committed. If, under such circumstances, the conspirators are subjected, so far as the statute of limitations is concerned, to a prosecution every time they commit an overt act, that result is not brought about by any act of the prosecution in splitting up a continuous offense, as was attempted to be done in *In re Snow* (120 U. S., 281; 7 Sup. Ct., 556, 30 L. Ed., 658), a prosecution for unlawful cohabitation with several wives, or by tolling the statute of limitations; but the result flows directly and exclusively from the acts of the conspirators themselves. It might be said of their complaint, as was said by the Supreme Court of Vermont quoted by the Supreme Court of the United States in *O'Neil* v. *Vermont* (144 U. S., 331; 12 Sup. Ct., 696; 36 L. Ed., 450) [a prosecution for unlawful selling of liquor, in which the defendant was convicted of 307 offenses and sentenced, in the aggregate, to a fine of $6,638.72 and to imprisonment for more than fifty-five years]

that the result is brought about not by the law, nor by any interpretation of it, nor by any act of the prosecution, but solely by the fact that the complaining defendants committed too great a number of offenses. Obviously, if the defendants had been charged with numerous different conspiracies, completed, as regards the ability of the Government to prosecute, by the commission of many different overt acts, they would not be heard to complain of a situation brought about entirely by their own criminal acts, and which subjected them to many prosecutions. What difference, so far as regards the statute of limitations, is there in principle between the condition just stated and the proposition that there may be as many prosecutions as there are overt acts, when the same conspiracy is renewed as each different overt act is committed? The conspiracy C, plus overt act A, create a criminal condition for which the Government can prosecute under the terms of Rev. Stat., section 5440, during three years from the date of overt act A. The same conspiracy C, or any other conspiracy, plus overt act B, create another and a different criminal condition, for which the Government can prosecute during three years from the date of overt act B. And so on. No court has ever held that under Rev. Stat., section 5440, the statute of limitations begins to run from the original formation of the conspiracy and before the commission of any overt act. As I have said before, it is inconceivable to me that the statute of limitations should

> begin to run before the Government could prosecute. The difference of opinion is: (1) Whether the statute of limitations begins to run from the commission of the first overt act, regardless of any subsequent overt acts? Or (2) whether a prosecution begun within three years of any overt act, committed to effect the purpose of a conspiracy then in existence and in full operation, is maintainable.

This was probably the first dissent from the view that the action was barred within three years from the commission of the first overt act; and the reasoning was on appeal adopted by the Circuit Court of Appeals, Fifth Circuit (152 Fed., 616).

In *United States* v. *Brace* (149 Fed., 874, 876, 877) Judge De Haven expressed his views in the following language:

> In my opinion the allegation in the indictment that the defendants during all the times between May 25, 1902, and the commission of the last overt act therein set forth continued to conspire together to defraud the United States of the title to its public lands, in the manner and by the means agreed on between them on May 25, 1902, is not equivalent to a charge that the defendants subsequently to that date entered into a new conspiracy for the purpose of accomplishing their unlawful design to defraud the United States of certain of its public lands. It is simply, in effect, an allegation that the conspiracy formed on May 25, 1902, was never abandoned, but was in continuous operation thereafter until the date of the last overt act set out. The indict-

ment, therefore, is to be construed as charging but one conspiracy; that such conspiracy was formed by the defendants on May 25, 1902, and numerous overt acts were thereafter committed by them for the purpose of effecting its object, the first of these acts on June 10, 1902, and the last on September 15, 1902; that from the date of its formation until the commission of the last overt act in pursuance thereof, the conspiracy so formed on May 25, 1902, was, in the language of the indictment, "continuously in process of execution." Assuming that the conspiracy was formed and the overt acts committed upon the particular dates named in the indictment, the precise question which is raised by the demurrers to the special pleas relates to the time when the right of the Government to prosecute the defendants for the offense charged in the indictment began to run.

Section 1044 of the Revised Statutes (U. S. Comp. St., 1901, p. 725) provides that no person shall be prosecuted for an offense of the character described in this indictment unless the indictment is found "within three years next after such offense shall have been committed;" while the succeeding section declares that this limitation shall not extend to the case of any person fleeing from justice. The contention of the defendants is that the right of the Government to prosecute them accrued upon June 10, 1902, the date of the first overt act, and as this was more than three years prior to the finding of the indictment the right to prosecute for such offense is barred; and

support for this contention is undoubtedly found in the cases of *United States* v. *Owen* (D. C.; 32 Fed., 534), *United States* v. *McCord* (72 Fed., 159), *Ex parte Black* (D. C.; 147 Fed., 832), *Commonwealth* v. *Bartilson* (85 Pa., 482), and *Insurance Co.* v. *State* (75 Miss., 24; 22 South., 99). The argument which is advanced to sustain this conclusion is very strongly stated by Deady, J., in *United States* v. *Owen* (D. C.; 32 Fed., 534), and proceeds upon the theory that a conspiracy is not to be deemed a continuous crime while in process of execution, but is a completed offense the moment the first overt act is committed in pursuance thereof, as much so and in the same sense as the crime of murder or arson is complete and at an end when the deed is done. Of course, if this be so, the statute of limitations would commence to run at the date of the commission of such overt act; but it seems to me that the more reasonable view is that which was followed by the Supreme Court of Illinois in the case of *Ochs* v. *People* (Ill.; 16 NE., 662) and *United States* v. *Greene* (D. C.; 146 Fed., 803–889), and that is to regard the conspiracy as a continuing offense so long as the parties thereto continue to perform acts to effect its object, and thus considered the prosecution thereof is not barred if any overt act has been committed within the statutory period. The crime defined in section 5440 of the Revised Statutes may be said to be a continuing offense so long as it is in process of execution, as manifested by

overt acts in pursuance thereof. At common law the crime of conspiracy was complete when two or more persons combined for the purpose of committing an unlawful act, and it was not necessary to allege or to prove an overt act; but under section 5440 of the Revised Statutes there must not only be the unlawful combination, but one of the parties must do some act for the purpose of effecting its object. (*Hyde* v. *Shine*, 199 U. S., 62; 25 Sup. Ct., 760; 50 L. Ed., 90; *U. S.* v. *Nunnemacher*, 7 Biss., 11, Fed. Cas. No. 15902; *U. S.* v. *Goldberg*, 7 Biss., 173, Fed. Cas. No. 15223.) The crime consists in putting the corrupt agreement into active operation, and so long as it is in operation the offense is a continuing one. This being so, my conclusion is that whenever a person commits any act in pursuance of an existing conspiracy, no matter when such conspiracy was formed or how many precedent acts have been committed for the purpose of effecting its object, the offense defined in section 5440 of the Revised Statutes (U. S. Comp. St., 1901, p. 3676) is then committed and is subject to prosecution. In saying this I do not mean to be understood as holding that when a number of acts have been committed in furtherance of one conspiracy there may be as many prosecutions therefor as there were acts. There can be but one prosecution based upon a single conspiracy, and this is not barred as to any overt act within the statutory period.

In *United States* v. *Raley* (173 Fed., 159, 167) Judge Wolverton, after quoting from the case of

Jones v. *United States*, hereinafter set forth, and citing several cases, concluded as follows:

> I take it that the true doctrine is that, so long as it may be shown that the conspirators are acting together for the common purpose comprehended by the scheme, and have, while so acting together, committed some overt act, all within the three years prior to the finding of the indictment, the statute has not run. A conspirator may withdraw from the common purpose. If he does so, and three years have run without his participation, although others of the original conspirators may have continued in the execution of the common design, he could not be prosecuted. But as to those who are still participating in the effectuation of the unlawful purpose when the overt act is committed, being committed within the three years, they are still confederating, conspiring, and agreeing together, and are chargeable with having committed the offense of conspiracy within the statute fixing the limitation for prosecuting the same.

In *United States* v. *Breese* (173 Fed., 402, 411) Judge Newman, in charging the jury, said:

> In the opinion of the court the law applicable here, and to the facts of this case, is this: The indictment charges a conspiracy was entered into on July 1, 1897. It would be immaterial whether the conspiracy charged, if you believe there was a conspiracy, originated more than three years before the finding of the bill of indictment, indeed it would be immaterial if it was entered into soon after

this bank was established in 1888, 1889, 1890, or 1891, provided you believe that overt acts were committed all along down during the succeeding years and to a period within three years before the finding of the bill of indictment; if also there was continued unlawful agreement and understanding between the parties, amounting to a conspiracy, all along down to and within the period of three years before the bill of indictment was found true on October 5, 1897. The law is that there may be a renewal or a continuance of a conspiracy if there be renewed and continued combination, agreement, and understanding between the alleged conspirators, and successive acts are done in pursuance of and to effect and consummate the conspiracy. No matter when the conspiracy originated, if you believe that there was a continued understanding, expressed or tacit, amounting to a conspiracy, between the alleged conspirators, or any two of them, and acts were done in furtherance of and to effect the object of the conspiracy along down to, and embracing a period within, three years before the finding of this bill of indictment, which, as stated, was October 5, 1897, then you would be authorized to consider the same and act upon the same, notwithstanding the fact that these defendants, in your opinion, had an agreement and understanding and did acts to consummate and carry the same into effect more than three years before the finding of the bill of indictment. The conspiracy, however, must have been in existence and have been in operation

> within three years of the finding of the bill of indictment, and, further, there must have been some act done by at least one of the conspirators to effect the object of the conspiracy within the three years.

In *Ware* v. *United States* (154 Fed., 577, 579, 580) Judge Sanborn expressed the opinion of the Circuit Court of Appeals, Eighth Circuit, in the following language:

> After a careful reading and consideration of these and other authorities, our conclusions are that the true answer to this question is that the existence of the conspiracy and the conscious participation of the defendant therein within the three years are indispensable to the maintenance of such a prosecution, but that if these facts are established by competent evidence such a prosecution may be sustained. Proof of the formation by the defendant and others, more than three years before the indictment, of such a conspiracy as that charged in the indictment under which an overt act has been done prior to the three years is insufficient to sustain the charge of a conspiracy within the three years. But in connection with evidence aliunde of the existence of the same conspiracy, and of the defendant's conscious participation therein within the three years, it is competent evidence for the consideration of the jury in determining the issue presented by the indictment. An overt act committed by one of the alleged conspirators within the three years pursuant to a conspiracy between him and

the defendant, formed and followed by an overt act more than three years prior to the filing of the indictment without the defendant's consent or agreement within the three years to the continued existence and to the execution of the conspiracy, is incompetent to establish its existence and his participation therein within the three years.

The offense under section 5440 is the conspiracy, not the conspiracy and the overt act. "The provision of the statute," says the Supreme Court, "that there must be an act done to effect the object of the conspiracy, merely affords a locus penitentiæ, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute." (*U. S.* v. *Britton*, 108 U. S., 199, 205; 2 Sup. Ct., 525; 27 L. Ed., 703.) So that there is a locus penitentiæ after the performance of each overt act and a presumption of the innocence of the defendant, and if, after the performance of the first overt act, a defendant abandons the design of the conspiracy and the prosecution of the conspiracy and of the first overt act becomes barred by the statute, the overt acts of other conspirators within the three years in the performance of the old conspiracy without the conscious participation of the defendant ought not to charge, and can not charge him with the offense, because they fail to evidence his intent to violate the law within three years.

On the other hand, the offense denounced by section 5440 is not the mere formation,

but the existence, of the conspiracy and its execution. And if, by the agreement, or by the joint assent of the defendant, and one or more other persons, within the three years, the unlawful scheme of the conspiracy is to be prosecuted, and an overt act is subsequently done to carry it into execution, the mere fact that the same parties had conspired and had wrought to accomplish the same or a like purpose, more than three years before the filing of the indictment, ought not to constitute, and does not constitute, a defense to the charge of the conspiracy within the three years.

The same rules of law and of evidence govern the trial and the decision of the issue whether or not the defendant jointly with others consented or agreed within the three years to the existence of the conspiracy and the subsequent execution of its scheme which control the trial of the issue whether or not the conspiracy was originally formed, where that is the crucial question. Evidence must be produced from which a jury may reasonably infer the joint assent of the minds of the defendant and of one or more other persons within the three years to the existence and the prosecution of the unlawful enterprise. Until such evidence is produced, the acts and admissions of one of the alleged conspirators are not admissible against any of the others unless the court in its discretion permits their introduction out of their order. But where evidence has been produced from which the joint assent of the defendant and one or more other persons

> within the three years to the existence and the execution of the conspiracy may reasonably be inferred by the jury, then any subsequent act or declaration of one of the parties in reference to the common object which forms a part of the res gestæ may be given in evidence against one of the others who has consented to the enterprise. And the joint assent of the minds of a defendant and others within the three years to the existence and execution of the conspiracy may be found by the jury like any other ultimate fact as an inference from other facts proved. (*Drake* v. *Stewart*, 22 C. C. A., 104, 107; 76 Fed., 140, 143.)

In *Jones* v. *United States* (162 Fed., 417, 426, 428) Judge Ross expressed the views of the Circuit Court of Appeals, Ninth Circuit, as follows:

> By some courts it has been held that inasmuch as the offense under section 5440 is the conspiracy, made effective by the commission of an overt act thereunder, the statute of limitations, which is three years, begins to run as soon as the first of such overt acts is committed, and that three years thereafter the entire offense denounced by the statute becomes barred. (*U. S.* v. *Owen* (D. C.), 32 Fed., 534; *U. S.* v. *McCord* (D. C.), 72 Fed., 159; *Ex parte Black*. (D. C.), 147 Fed., 832.) If the conspiracy in question contemplated but the one overt act, that would undoubtedly be so. But we think it equally plain that where, as in the present case, the alleged conspiracy contemplated various overt acts, and the consequent continuance of the

conspiracy beyond the commission of the first one, then each overt act gives a new, separate, and distinct effect to the conspiracy, and constitutes another crime. Take, for illustration, a case that arose in California many years ago, reported in 64 Cal., 293, 30 Pac., 847, under the title of *People* v. *Collins*, where a murder was committed in pursuance of a conspiracy entered into by three men named, respectively, Collins, Thorne, and Crumm, for the robbing, among other things, of stages and their passengers whenever and wherever opportunity offered. In that case it appeared that, before Collins and Thorne committed the crime for which Collins was adjudged to suffer death, Crumm withdrew from the conspiracy; that is to say, he took advantage of the "locus penitentiæ," and thus avoided the penalty to which he also would otherwise have been subject. But Collins and Thorne proceeded with the unlawful and wicked undertaking, camped in the vicinity of Nevada City, Cal., held up a stage, compelled the passengers to alight therefrom, and upon the refusal of one of them to surrender his valise, containing two bars of gold bullion, one of the robbers fired upon him with a shotgun, killing him almost instantly. Months afterwards Collins was apprehended, and was finally tried, convicted, and sentenced to death. Suppose that California had a statute requiring, as does section 5440 of the Revised Statutes, an overt act to make the conspiracy effective, and that after the holding up of that one stage and the commission of that one murder the conspirators,

> in pursuance of the same conspiracy, had held up other stages and committed other murders; would there be any sound sense in holding that no other or further crime had been committed, on the ground that the offense had been completed and ended by the first murder, the first overt act? We do not think so, for the reason that the conspiracy was a continuing one in its nature, and, so long as the conspirators continued in pursuance of it, each overt act committed by any one of them gave to the conspiracy effect and constituted an offense at the time of the commission of the act. So, in the case at bar, the conspiracy alleged contemplated the commission of various overt acts. It was a continuing conspiracy, and so long as the conspirators continued in pursuance of it, and did not avail themselves of the locus penitentiæ that section 5440 of the Revised Statutes afforded them, every overt act committed by any party to the conspiracy gave new effect to the conspiracy and constituted another crime.

In *Lorenz* v. *United States* (24 Appeals, D. C., 337, 387, 388) the views of the Court of Appeals, District of Columbia, was thus expressed by Chief Justice Shepard:

> The contention on behalf of the appellants is that, if the conspiracy was in fact formed, and a single act in aid of its object committed, more than three years before the finding of the indictment, then the offense was barred by the statute of limitations; and that no other like act or acts, committed within three years,

> would amount to a renewal or continuance of the conspiracy so as to remove the bar.
>
> We can not agree with this contention. Undoubtedly, as argued, the conspiracy is the gist of the offense defined in section 5440, Revised Statutes (U. S. Comp. Stat., 1901, p. 3673), though it is not indictable until some act shall have been done by one or more of the conspirators to effect the object of the corrupt agreement. The offense is then complete as to that act, and the statute at once begins to run; but it does not follow that all similar acts thereafter may be committed with impunity. Through the repetition of such acts—overt acts, as they are commonly called—the conspiracy is made a continuing offense. By each subsequent act it is repeated and entered into anew.

In the present case the court held without discussing the question that an overt act committed *in furtherance of the conspiracy* within three years before the finding of the indictment would prevent the bar of the statute.

In *United States* v. *Greene* (115 Fed., 343, 355) the question of the bar of the statute was not involved, but Judge Speer approved the principle laid down by Judge Marcy in *People* v. *Mather* (4 Wend., 229) that—

> the law considers that wherever they (conspirators) act there they renew, or perhaps, to speak more properly, they continue, their agreement; and this agreement is renewed or continued as to all whenever one of them does an act in furtherance of their common design.

Second. *Nature of the offense of conspiracy under section 5440, Revised Statutes.*

In *United States* v. *Britton* (108 U. S., 199, 204, 205) this court, speaking through Mr. Justice Wood, said:

> This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiæ*, so that before the act done either one or all of the parties may abandon their design and thus avoid the penalty prescribed by the statute.

In *Dealy* v. *United States* (152 U. S., 539, 543, 547) the indictment was drawn under section 5440, Revised Statutes, and contained seventeen counts, of which six were dismissed and a verdict of guilty was brought in on all the remaining counts except one. The difference in the counts consisted in the fact that a different overt act was alleged in each, and it was insisted that the acquittal as to one count was an acquittal as to all; and as to the effect of the overt act under this statute the court said:

> In the case at bar the section of the statute under which this indictment was found requires not merely a conspiracy, but some act to carry into effect its object. This act is only one of the means by which the conspiracy is sought to be carried into effect, just as in the illustration given, the blow of the pickax and the shot from the pistol are means for the

> accomplishment of the homicide, and a verdict of not guilty as to any one of the counts in this indictment is not necessarily a finding against any conspiracy, but only that the conspiracy and the overt act therein stated did not both exist, while a verdict of guilty upon any other count finds both the conspiracy and the overt act named therein. There is no conflict between the findings and no force to this objection.

Subsequently, in considering the insistence that the indictment was fatally defective because it was not alleged that the overt acts were committed within the jurisdiction of the court, the above language was quoted with approval from *United States* v. *Britton*, and the court added:

> Hence, if the conspiracy was entered into within the limits of the United States and the jurisdiction of the court, the crime was then complete, and the subsequent overt act in pursuance thereof may have been done anywhere.

This definition of a conspiracy under section 5440, Revised Statutes, given in *United States* v. *Britton*, has been quoted by many courts, and though it was a dictum in that case it appears to have been accepted as the true construction of the statute.

Furthermore, such a construction is a reasonable one, although the view expressed by some judges, and in fact by Justice Wood himself while circuit judge (*United States* v. *Dennee*, 3 Woods, 50), that the overt act is an ingredient of the offense, is not

without reason. But the crime of conspiracy was an offense which had long been known to the common law; and it is reasonable that the intention of Congress was to make the common-law offense applicable to the conspiracies therein designated, with the condition that an overt act should be committed before a prosecution could be had. Such a construction is in accord with the general rule relating to offenses created by act of Congress which were known to the common law.

Third. *The effect of an overt act upon a conspiracy at common law.*

The effect of an overt act upon a conspiracy at common law appears from the following authorities.

In Wharton on Criminal Law, Seventh Edition, page 681, it is said:

> If a conspiracy be once established, although it was concocted out of the jurisdiction of the court, an overt act committed by one of the conspirators within the jurisdiction of the court, in the pursuit of the common object of said conspiracy, is the act of each conspirator. In such cases we are to view the overt act as a renewal of the original conspiracy by all the conspirators, wherever committed.

In *People* v. *Mather* (4 Wend., 259) the court said:

> If conspirators enter into the illegal agreement in one county, the crime is perpetrated there and they may be immediately prosecuted; but the proceedings against them must be in that county. If they go into another

> county to execute their plans of mischief and there commit an overt act, they may be punished in the latter county without any evidence of an express renewal of their agreement. The law considers that wherever they act there they renew, or, perhaps, to speak more properly, they continue their agreement, and this agreement is renewed or continued as to all whenever any one of them does an act in furtherance of their common design.

In 6 Amer. & Eng. Cyc. of Law, p. 844, it is said:

> But a court having criminal jurisdiction of the place where any overt act is committed would also have jurisdiction of the conspiracy itself, the overt act in such case being, in legal contemplation, a continuance or renewal of the illegal agreement.

Also see authorities cited in note 3.

And there seems to be no dissent from the rule laid down in these authorities, that a conspiracy may be prosecuted in any jurisdiction wherein an overt act is committed in furtherance of the object of the conspiracy.

Furthermore, there seems to be no dissent from the proposition that at common law a prosecution for conspiracy is not barred if an overt act in furtherance of the conspiracy is committed within the statutory period before the finding of the indictment.

This question is probably more fully discussed in *Commonwealth* v. *Bartilson* (85 Pa. State, 482, 489, 490) than elsewhere.

This is a leading case in this country upon the question, and the principal part of the opinion of the court bearing upon this question is as follows:

> Acts and declarations of the parties prior to the statutory period may be given in evidence, provided they tend to show a conspiracy existing at the time charged in the indictment. It is true they would not be admissible for the purpose of proving a distinct crime barred by the statute. But where in conspiracy an overt act is done within two years and said act is but one of a series of acts committed by the parties, evidently in pursuance of a common design and to carry out a common purpose, such acts would be evidence, provided they tend to show that the last act was a part of the series and the result of an unlawful combination; and such evidence may satisfy a jury of the existence of a conspiracy at the later period. And this though some of the prior acts may have occurred at a time when, as an independent conspiracy, it would have been barred by the statute. For, as before said, the overt acts are the evidence from which a conspiracy may be inferred. Hence it is that while as a general rule in criminal cases the venue must be laid in the county in which the offense was committed, yet in conspiracy it may be laid in any county in which an overt act has been done by any one of the conspirators. This rule is well settled. (Whart. Cr. Law, sec. 2350; Arch. C. P., 6; *Rex* v. *Scott*, 4 East, 164; *The People* v. *Mather*, 4 Wendell, 230.) This rests upon the

principle that the overt act is evidence of a conspiracy existing at the time and place where the overt act was committed. Of course, the overt act must be such as to tend to show that it was the result of conspiracy. As is said in Arch. C. P. & P., 1056, "Every overt act, to be evidence, must have at least a tendency to prove either the general nature of the conspiracy, or that one or more of the defendants were operating toward effecting that which is charged in the indictment as being the object of the conspiracy." But if the overt act charged in the indictment, or proved to have been done within two years, is sufficient to satisfy the jury of the existence of a conspiracy at that time, it is wholly immaterial when the parties thereto first formed the unlawful combination in their minds, or gave effect to it by concert of action. If it has been renewed from time to time, and overt acts committed through a series of years, and one of said acts has taken place within two years, each renewal constitutes a fresh conspiracy, for which an indictment will lie. It has been held that where a conspiracy had been formed outside of the jurisdiction of the court, an overt act committed within the jurisdiction is evidence of a conspiracy there. (*Rex* v. *Scott, supra.*) And all who accede to a conspiracy after it is formed become conspirators. (*People* v. *Mather, supra.*) For the reasons given we think the court below erred in quashing the second count.

The opinion of the court in this case is not altogether consistent, as the reasoning would imply that the conspiracy is a continuing offense, of the existence of which overt acts are evidence, while the conclusion was that overt acts are evidence of *renewals* of the conspiracy, and each renewal is an independent offense. This inconsistency manifestly arose out of an attempt upon the part of the judge delivering the opinion to explain an assertion which he had made in a previous opinion that there was no such thing as a continuing and completed offense. With reference thereto the court said:

> It was not intended to assert the absurd proposition that a man might not repeat an offense from day to day, as in the case of maintaining a nuisance, and other familiar instances which might be referred to. This may be done daily for any indefinite period. But a man could not be convicted of maintaining a nuisance charged to have been committed ten years prior to the finding of the bill of indictment by proving that he had continued the nuisance day by day to a time within the statutory period. In the sense, therefore, of tolling the statute it can not be said that a completed offense can be continued. It may be repeated from day to day, but the statute runs from the close of each day, and the indictment must charge the offense to have been committed within the statutory period.

The conclusion here reached by the court is a manifest absurdity, as it would be just as reasonable to

hold that one might be indicted at the end of every minute for maintaining a nuisance; and in order to be consistent therewith the court laid down the rule that the overt act was a mere evidence of a new conspiracy; and that the indictment must allege that the conspiracy, of which the overt act was evidence, was made within such time as would bar the prosecution. The court, in fact, sustained the quashing of one count of the indictment because it alleged that the conspiracy originally had been made more than the statutory period before the finding of the indictment, though it alleged overt acts within the period; but a general count which alleged a conspiracy within the period without alleging any overt acts, was held good, though in the commonwealth attorney's specifications as to what his proof would be he showed that the conspiracy had been originally made more than the length of time specified by the statute, and that the overt acts had been committed within the time. The court's view was that each conspiracy, which is evidenced by an overt act, constitutes a new crime, and that a prosecution may be had for each renewal. The opinion of the court in this case was quoted at length and adopted by the Supreme Court of Mississippi in *American Fire Insurance Company* v. *State* (22 Southern, 99, 103), to which the court added:

> But where in conspiracy an overt act is done within two years, and said act is but one of a series of acts committed by the parties evidently in pursuance of a common design, and to carry out a common purpose, such acts

> would be evidence, provided they tend to show that the last act was part of the series, and the result of an unlawful combination; and such evidence may satisfy a jury of the existence of a conspiracy at the latter period. And this though some of the prior acts may have occurred at a time when, as an independent conspiracy, it would have been barred by the statute; for, as before said, the overt acts are the evidence from which a conspiracy may be inferred.

The Supreme Court of Illinois in *Ochs* v. *People* (124 Ill., 399, 429) said upon this subject:

> The first instruction as to all defendants was faulty and misleading in telling the jury that the crime of conspiracy was complete, and the offense was then committed, when the agreement or confederacy was entered into, and that the period of limitation would commence to run from the time of committing the offense. The instruction was calculated to lead the jury erroneously to think that the period of limitation would commence to run from the time a defendant first became a member of the conspiracy instead of from the time of the commission of the last overt act in furtherance of the object of the conspiracy.

From the foregoing authorities and those hereinafter cited it appears that four views have been taken by the courts as to the nature of the offense of conspiracy and the effect thereon of an overt act.

First. That the offense consists in the formation of the unlawful agreement, or, in other words, the

hatching of the plot, and that an overt act renews the conspiracy whenever and wherever such overt act is committed, and the parties may be prosecuted for the new conspiracy at any time within the statutory period after the renewal.

Second. That the offense consists in the *existence* of the plot and not merely of its formation, and that consequently the offense is a continuing one, and an overt act committed by one or more of the conspirators is evidence of its existence at the time and place where such act is committed.

Third. The same as the second except that the overt act is not within itself sufficient evidence of the continued existence of the conspiracy except as to those conspirators who engage in the overt act; but as to the other conspirators, evidence *aliunde* of their conscious participation in the conspiracy within the statutory period is necessary. This is the theory expressed by the Circuit Court of Appeals, Eighth Circuit, in *Ware* v. *United States*, *supra*, but we have failed to find elsewhere any concurrence in this view. The authority nearest in accord is *Commonwealth* v. *Bartilson*, *supra*, but it is there held that the overt act may of itself be sufficient evidence to satisfy the jury that the conspiracy then existed.

Fourth. That the offense of conspiracy under section 5440, Revised Statutes, is completed when the agreement is entered into and the first overt act is committed, and is not renewable by the commission of a subsequent overt act, and that the statute of lim-

itations bars the prosecution at the expiration of the statutory period from the first overt act.

As above shown, this theory is against the great weight of authority, and if maintainable at all it must be because there is something in the language of section 5440, Revised Statutes, which differentiates the offense created thereby very materially from the offense of conspiracy at common law. But in *United States* v. *Britton, supra,* this court has held that the two offenses are identical.

Although the second theory is probably the more convenient one to prevent the running of the statute, yet I think the weight of authority and the better reasoning is with the first theory, except I do not think more than one prosecution can be maintained for the conspiracy, though it may be renewed many times by the commission of overt acts.

As to what constitutes the offense of conspiracy, in 2 Bishop on Criminal Law, section 171, it is said:

> Truly viewed, conspiracy is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end.

In Wright's Criminal Conspiracies, edited by Carson, on pages 124 and 125, it is said:

> The fact of confederating is the gist of the offense, or, as C. J. Savage has said: *The conspiracy is the offense.* The conspiracy itself is the crime. It is different from an indictment for stealing, or an action for trespass, where the offense consists of an act done. The devising of means is not a constituent part

> of the offense, but an act done in pursuance of the original design. It is not the actual perpetration, but the original hatching of the plot which constitutes the offense. The overt acts charged to have been done in pursuance of a conspiracy are mere matters of aggravation and are not necessary to the consummation of the crime. The unlawful agreement constitutes the gist of the offense, and therefore it is not necessary to charge the execution of the unlawful agreement, and when such execution is charged it is to be regarded as proof of the intent or as an aggravation of the criminality of the unlawful combination. The crime is consummate and complete by the fact of the unlawful combination, and therefore if the execution of the unlawful purpose be averred it is by way of aggravation, and proof of it is not necessary to conviction, and therefore the jury may find the conspiracy and negative the execution, and it will be a good conviction. The crime is effected the moment the confederation is complete, though nothing be done in pursuance of the conspiracy.

In *Callan* v. *Wilson* (127 U. S., 540, 562) this court quoted the following definition from *Commonwealth* v. *Hunt* (4 Metcalf 111, 121):

> * * * It is a criminal and indictable offense for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal to the injury of the public, or portions or classes of the community, or even to the rights of an individual.

Wharton's definition of conspiracy as given in 2 Wharton's Criminal Law, section 1337, eighth edition, reads as follows:

> An indictable conspiracy is a confederation by two or more persons to commit an indictable offense; or by deceit or falsehood or other fraudulent means to defraud the public generally, or a particular individual, though in a way which might not expose a single person to indictment if the fraud was undertaken by him alone.

This definition does not make it clear whether the offense is completed when the combination is entered into or whether it continues to exist; but according to the other definitions it is the *formation* of the conspiracy that constitutes the offense, and its mere existence thereafter is no part thereof. There is no dispute among the authorities that the offense is complete, and the conspirators may be prosecuted, the moment the unlawful agreement has been entered into; and clearly it can not be perpetuated by the mere existence of the agreement in the minds of the conspirators. But, however this might be at common law, I think the language of section 5440, Revised Statutes, that "if two or more persons *conspire*" can leave no doubt but that the offense created by this statute consists in the *formation of the conspiracy*, and that it is not a continuing one.

Then, what is the effect upon the conspiracy thus formed by the commission of an overt act in furtherance thereof by one of the conspirators? This must be determined by the results contemplated by the

parties entering into the agreement and that must naturally flow therefrom. When two or more persons conspire together unlawfully, they enter into a partnership for the accomplishment of the object contemplated; and every one of them agrees that he shall be represented in the accomplishment of the purposes had in mind by each of the other conspirators, and each of them is, therefore, an agent to that extent of them all, and whatever is done by either is the act of them all. When, therefore, an overt act is committed by one of the conspirators, it is the same as if every conspirator was present and engaged in that act. And this concerted action, performed for the accomplishment of an end understood by all, must, therefore, have the same effect as if all the parties had then and there entered into a new agreement, having precisely the same terms as the conspiracy that existed in the beginning. This does not, however, carry with it liability to prosecution for both the original conspiracy and the renewal thereof, as they are, in fact, the same conspiracy, the effect of the renewal being precisely the same as when one is liable to another by note, and to prevent the bar of the statute of limitations the old note is extinguished by the execution of a new one. The indebtedness is renewed, but no additional liability is incurred, because the new note is for the same indebtedness as the old.

No other theory is compatible with the holding of the courts that when a conspiracy is formed in one jurisdiction, and an overt act is committed in another,

the conspirators may be prosecuted within the jurisdiction where the overt act is committed. As the offense is the conspiracy, the prosecution is for the conspiracy and not for the overt act, and therefore the *conspiracy* must exist in the jurisdiction where the prosecution is had, which could not be unless the overt act renewed the conspiracy, and thus brought it within that jurisdiction.

If this theory be correct, then the conclusion reached by the Circuit Court of Appeals, Eighth Circuit, in *Ware* v. *United States, supra,* is wrong. Under the rule there laid down, where more than three years have elapsed since the commission of the first overt act, it is incumbent upon the Government to prove that there has been conscious participation by the defendant on trial in the conspiracy within three years, and that it is not sufficient to prove alone the commission of an overt act by a co-conspirator within that time. If each conspirator is, under the original agreement, an agent of all of them, such an agency will be presumed to exist until it is shown by evidence that one of them has withdrawn from the agreement; and this is especially true if the agreement contemplates a series of acts, as certainly, when one agrees with others upon the performance of acts necessary to accomplish a definite object, it will be presumed, until the contrary is shown, that he has not withdrawn from such agreement; and that each act in furtherance of the common design is committed by his consent.

If this were not true, before a prosecution could be maintained within a jurisdiction other than the one in which the conspiracy was entered into, it would be necessary to prove, not only the commission of an overt act in such jurisdiction, but also by evidence *aliunde* that the conspiracy existed there, which has never been suggested by any authority.

The opinion of Judge Parlange in *U. S.* v. *Bradford, supra*, which was adopted by the Circuit Court of Appeals, Fifth Circuit, also presents a very forceful and plausible theory why an overt act committed within three years prevents the running of the statute against an offense under section 5440. That theory is that the offense consists in the conspiracy, and that the phrase "and one or more of such parties do any act to effect the object of the conspiracy" provides a condition for a prosecution, which condition is not met alone by the first overt act, but arises on the commission of every overt act thereafter. The statute, it will be noted, makes no distinction in its terms between the several overt acts that may be committed in furtherance of the conspiracy, and no reason is apparent why the condition for the prosecution is not just as much complied with by the execution of the tenth overt act as by the first.

Suppose a conspiracy contemplated that no overt act should be committed within three years, and none were committed within that time, and thereafter one of the conspirators did commit such act, it, of

course, would not be insisted that the prosecution would be barred. Can there be more reason for holding that the prosecution for the offense which had been committed for more than three years before was saved by the arising of this condition, than to hold that the right of prosecution is saved by the commission of any subsequent overt act of precisely the same nature and designed for the same purpose?

Therefore the judgment of the court below should be reversed and the cause remanded for trial.

J. A. FOWLER,
Assistant Attorney-General.

OCTOBER, 1910.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1909.

NO. 798.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

JAMES T. BARBER AND SUMNER G. MOON,

Defendants in Error.

Brief of Defendants in Error

Record.

Owing to the fact that this case was tried at Boise by Hon. Robert S. Bean, of Portland, who was not present when the court minutes disposing of the issues were made (76 R., 45 T.); that defendants' pleas in abatement were not filed until after argument on demurrer had been heard and taken under advisement (75 R., 44 T.); that the government neither replied nor demurred to such pleas until after the decision of December 21st, 1909, which demurrers were filed *nunc pro tunc* as of December 16th, 1909, pursuant to leave granted the government by order dated December 27th, 1909 (76 R., 45 T.); and that no formal judgment was entered on the issues thus made, the record in this case is somewhat confusing, but the material facts disclosed by it are as follows:

The proceeding is based upon an indictment against defendants in error and others, returned in the District

Court of the United States for the District of Idaho. The indictment charges a conspiracy between the defendants in error and others to defraud the United States out of the possession of and title to certain public lands, in violation of section 5440 R. S. This indictment consists of four separate counts, the only one involved here being the fourth, found at pages 21 to 40 R., 14 to 26 T.

On July 1st, 1909, defendants filed a demurrer to this indictment in general, and specifically demurred to the first three counts. (59 R., 39 T.)

As appears from the court minutes, the matter came on for hearing on defendants' demurrer to the indictment on December 15th, 1909, whereupon leave was granted to the defendants to file a separate demurrer to count number four (75 R., 44 T.), and thereupon defendants demurred specially to this count. (61 R., 36 T.)

On December 16th, 1909, argument was closed, and the matter taken under advisement by the court, with leave to the defendants, by agreement of counsel for the respective parties, to file a plea in abatement. (75 R., 44 T.)

Pursuant to permission thus granted, the defendants in error, on December 16th, 1909, separately filed pleas in abatement to count number four. (63-65 R., 37-38 T.)

On December 21st, 1909, the parties appeared in court by their respective counsel, whereupon the defendants withdrew their demurrer to the third count, and complainant confessed the demurrer to the second count, and in accordance with the direction of Hon. Robert S.

Bean, who theretofore had heard and taken under advisement said demurrer and said plea in abatement, a minute was made on the court records overruling and denying defendants' demurrer and plea in abatement to the first count and sustaining the plea in abatement to the fourth count. (76 R., 45 T.)

On the same day, December 12st, 1909, the parties, by their respective counsel, entered into a stipulation pursuant to which the court minutes were made, to the effect that a *nolle* and order of dismissal be entered as to counts numbers one, two and three, and that the demurrer and plea in abatement of the defendants to the fourth count be heard and determined together, and that the order or ruling made on either should be deemed to have been made on both. (71 R., 42 T.)

On the same day, for the purpose of completing the record and avoiding the necessity of making an issue of fact on the pleas, the parties made a further stipulation that certain facts should be considered with the same force and effect as though set out in full in the plea in abatement. (68 R., 40 T.)

On December 27th, 1909, six days after the decision, counsel for the government applied for and were granted permission to file separate demurrers to defendants' pleas in abatement, the same to be filed *nunc pro tunc* as of December 16th, 1909, when the cause was submitted. (76 R., 45 T.)

No formal judgment was entered, except as shown by the court minutes on December 21st, 1909, by which defendants' plea in abatement to the fourth count is sustained.

This writ of error is brought under the provisions of the Criminal Appeals Act of 1907 to review the decision of the court on the issues thus made: first, by the indictment and defendants' demurrer thereto; and second, by defendants' plea and complainant's demurrer thereto.

Argument.

This Court has no jurisdiction, and the writ of error should be dismissed.

This Court, in *United States v. Cook*, 84 U. S. 179, said:

> "Accused persons may avail themselves of the statute of limitations by special plea or by evidence under the general issue,"

and Judge Dehaven of the Ninth Circuit, in *United States v. Brace*, 143 Fed. 703, held that the question of statute of limitations could not be raised by demurrer, but by a plea in the nature of a *plea in abatement*, or by evidence under the general issue.

Conforming to the rules thus established, the defendants, at the close of a two days' argument on demurrer, and by consent of counsel for the government and the court, filed the pleas in question as *pleas in abatement*. The parties stipulated that the demurrer and *plea in abatement* should be heard together, and the ruling or order made on either should be deemed to have been made on both. (71 R. 42 T.) The court deemed it a *plea in abatement*, and so ruled on December 21st, 1909. (76 R., 45 T.) Nearly one week later, and on December 27th, 1909, counsel for the government applied for and was granted permission to demur to defendants' *plea in abatement*. (76 R., 45 T.)

Whether, technically speaking, the statute of limitations should be raised by plea in bar or plea in abatement is not material here. No objection was taken on that ground in the court below, but, on the contrary, pleas in abatement were filed and heard by consent and by stipulation. The judgment entered does not purport to be a bar to future proceedings, but is an abatement and dismissal of the pending cause only.

But whatever the rule as applied to other crimes, a plea in abatement is the proper plea when an indictment for conspiracy fails to allege an overt act within three years. As repeatedly held by this Court, the crime "does not consist of both conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone". But the doing of some act to effect the purpose is a prerequisite to the right of the government to prosecute. Unlike other offenses, the right to prosecute does not accrue when the offense (that is the unlawful agreement) is committed, but when an act is done to effectuate it. Hence it is incumbent to allege and prove (a) that the defendants conspired; (b) that some one of them did an act to effectuate its purpose; and (c) that the right of the government to prosecute did not accrue more than three years before filing the indictment. *U. S. v. McCord*, 72 Fed. 159.

The plea of defendants in the case at bar presented two propositions: first, conceding that the indictment alleged the *existence* of a conspiracy within three years, there was no allegation of any act within that time which could, by any possible interpretation

be said to have been done to effectuate its purpose; and therefore the right to prosecute had not accrued; and second, that as all acts therein alleged which could be said to effectuate the purpose of the conspiracy were performed more than three years before filing the indictment, the government should proceed no further on this indictment.

It must be remembered that the government is not bound to set forth all of the acts of the conspirators tending to effectuate its purpose. It may select such of those acts as it intends to rely upon. If the selected acts prove to be of such a character as not to give the right of prosecution,— in other words, if they are not such acts as tend to effectuate the purpose of the conspiracy,— the indictment is bad, but the right to prosecute is not barred. Another indictment can be procured alleging other acts of the character specified in the statute, and the fact that a former indictment wasd ismissed because it did not show that the right to prosecute had accrued would be no bar to the action.

For these reasons, it is respectfully submitted that in cases of conspiracy a plea in abatement is the proper method of raising the defense that the right to prosecute has not accrued, because no one of the conspirators has "done any act to effectuate the object of the conspiracy."

Again, the defendants interposed a general demurrer to the fourth count for the reasons and upon the ground that such count did not state facts sufficient to constitute an offense. It appears from the record that two days were occupied in the argument of this demurrer.

The parties have stipulated that any judgment entered on the plea in abatement *should be deemed entered on defendants' demurrer.* Defendants, therefore, have, by stipulation, the right to a formal judgment dismissing the action on demurrer for the reason that it does not state facts sufficient to constitute an offense. As to whether or not the court decided any question in passing on this demurrer which would give this Court jurisdiction does not appear. The record does not show that the trial court either passed upon the validity of, or construed, section 5440, and as jurisdiction must affirmatively appear from the record, this writ of error should be dismissed.

The demurrers to defendants' pleas were properly overruled, and on failure to raise an issue of fact by replication, the pleas were properly sustained.

Assuming defendants' plea to be one in bar and not in abatement, and the only question presented in the court below, or in this Court, is the sufficiency of such plea on demurrer. Does the plea, if true, state a defense? It alleges that the indictment was not filed and no information returned until more than three years after the commission of the offense, and that during such period neither defendant was a fugitive from justice. The indictment shows the offense is not capital, or within the exceptions mentioned in section 1044 R. S., which provides:

> "No person shall be prosecuted, tried or punished for any offense * * unless the indictment is found or the information is instituted within three

years next after such offense shall have been committed."

In the case of *United States v. Celestine*, 215 U. S. 288, the question came before this Court on the government's demurrer to the special plea in bar interposed by the defendant. The only question passed upon was the sufficiency of the plea, which was sustained by the court below and the ruling reversed by this Court.

It is contended that the government's demurrer to defendants' plea should have been sustained, because (a) a special plea in bar is not permissible in a criminal case, but the defense of the statute of limitations must be made under the general issue; and (b) the plea is bad in form in that it does not confess the allegations of the indictment.

That the defense of the statue of limitations can be set up by special plea is established by the ruling of this court in *United States v. Cook*, 84 U. S. 179, and as all special pleas in bar are in substance a confession and avoidance, such pleas necessarily confess all that has gone before and seek to avoid by allegations of new matter. It is not necessary, therefore, in terms, to confess the allegations of the indictment. Nor are the defendants responsible for the failure of the government to file a replication to their plea, or the failure of the court to take evidence when no issue of fact was made by the pleadings.

If the prosecuting officer disputes the facts set forth in a special plea in bar, he should reply thereto and raise and issue of fact. If he denies its sufficiency in law, he should demur. *12 Cyc*, 362.

The offense as charged in the fourth count of the indictment was barred by the statute of limitations when the indictment was found.

The precise question before this court is the correctness of the decision sustaining defendant's plea in bar (assuming it to be such) as against complainant's demurrer thereto. This plea, being one in confession and avoidance, confesses all allegations of fact properly pleaded in the indictment. Hence there is before this court all such allegations of the indictment and any new matter pleaded in avoidance by defendants. In this case the allegation that defendants were not fugitives from justice constitutes the new matter.

In considering the indictment "the charging part" and allegations of overt acts must be considered separately, and each must be sufficient for its purpose. *United States v. Biggs*, 157 Fed. 264.

> "In an indictment for conspiracy under section 5440 the conspiracy must be sufficiently charged, and cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy".

United States v. Britton, 108 U. S. 205.

Pettibone v. U. S., 148 U. S. 203.

Charging Part Of Indictment. The charging part of the indictment alleges, eliminating unnecessary repetition and surplusage, that said Barber and Moon,

> "on September 1st, 1901, and at the time of the committing of the several overt acts hereinafter in this indictment set forth, and continuously and at all times, between said first day of September, 1901,

and the date of the presenting and filing of this indictment, did unlawfully conspire * * to defraud the United States out of the possession and use of and title to divers tracts of timber lands of the United States therein described, * * by unlawfully soliciting, inducing and procuring a large number of persons to apply for and enter such lands under the laws of the United States, * * upon an understanding and agreement between said defendants and said persons so to be solicited, which agreement was to be had, made and entered into prior to and at the time of the first applications to enter said lands of said persons so to be solicited: (a) that the title to the lands that they and each of them should then be applying to enter and which they might thereafter acquire should inure to the use and benefit of said defendants and conspirators; (b) that the said defendants would show and point out and select for said persons so to be solicited the lands which they and each of them would subsequently apply to enter, etc.; (c) that said defendants and conspirators would, if necessary, furnish the money to make final proof, etc."

In addition to the foregoing material allegations there is contained in the charging part some surplusage relative to what the defendants proposed to do with the land after the title was procured from the government, or in other words, what should be done with the land after the purpose of the conspiracy, namely, to defraud the government out of its title, should be completed.

This either charges one conspiracy of September 1st, 1901, and continuing to the date of the filing of the indictment, or it charges as many different conspiracies as are set out overt acts. If the latter contention prevail, the indictment is obviously duplicitious; but it was contended in the court below and here that it sets up only one conspiracy, beginning September 1st, 1901, and continuing throughout, and as the charging part does not allege a renewal of such original conspiracy, or any meeting of minds subsequent to the first one on September 1st, 1901, we will assume, for the purpos of this argument, that but one conspiracy is stated. If so, it becomes important to know when the right of the government to prosecute for this conspiracy accrued, and for this we must look to the overt acts alleged.

Overt Acts. The grand jurors find that in furtherance, continuance and renewal of *said* conspiracy and agreement, and to effect the object thereof, the said defendants (a) did induce sixty-eight entrymen to apply at the land office to purchase the lands described; (b) did unlawfully induce the entrymen to make final proof (Then follows a statement of the application and final proof of each of such entrymen, from which it appears that the date of the last final proof was September 20th, 1904, or nearly four years before the filing of the indictment on April 14th, 1908); (c) did induce certain of the entrymen to convey their lands to Palmer, Long and Rand; (d) that *thereafter*, to wit: on April 10th, 1905, defendants induced Long to make a deed to the Barber Lumber Company; (this clearly shows that the entrymen deeded to Palmer, Rand and Long prior

to April 10th, 1905). All of the foregoing overt acts are outside of the three year period. The following acts relied upon are within the three-year period); (e) that on May 27th, 1905, Palmer deeded to the Barber Lumber Company; (f) on June 28th, 1905, Palmer deeded other lands to the Barber Lumber Company; (g) on January 2nd, 1906, Palmer deeded still other lands to the Barber Lumber Company; (h) on July 5th, 1906, and February 2nd, 1907, the defendants procured said deeds last above mentioned to be recorded; (i) on April 15th, 1905, defendants caused deed from Long to the Barber Lumber Company to be recorded; (j) on May 22nd, 1905, defendants induced Chapman to write Horace S. Rand a letter requesting him to execute a deed to the Barber Lumber Company of the lands deeded to him by the entrymen; (k) on July 27th, 1905, defendants accepted the delivery of a deed dated July 24th, 1905, from Rand to the Barber Lumber Company.

All of these acts are alleged to have been for the purpose of effectuating the *said* conspiracy, referring to the conspiracy set out in the charging part of the indictment which began September 1st, 1901, and under which the first overt act was performed September 20th, 1901, when John I. Wells filed his application to purchase. (26 R., 18 T.)

We thus have a conspiracy of September 1st, 1901, followed by an overt act on September 20th, 1901, upon which latter date the right of the government to prosecute for *that* conspiracy accrued.

If, therefore, the conspiracy or "hatching the plot" constitutes the offense, and the statute of

limitations begins to run with the inception of liability in conspiracy cases as it does on the prosecution of every crime, the statute began to run against the offense set out in this indictment on the 20th of September, 1901, and the following cases so hold:

United States v. Owen, 32 Fed. 534.
United States v. McCord, 72 Fed. 159.
Ex parte Black, 147 Fed. 832.
Ware v. United States, 154 Fed. 577.
Commonwealth v. Bartilson, 85 Pa. State, 482.
American Fire Ins. Co. v. State, 22 So. 99.
United States v. Black, (C. C. A. 7th Cir.) 160 Fed. 432.
United States v. Biggs, 157 Fed. 264.
United States v. Irvine, 98 U. S. 450.

In *United States v. Owen, supra*, Judge Deady said:

> "When was this crime committed? The conspiracy was formed July 1st, 1881, and the first act done by any of the conspirators was on December 27th, 1881. The crime was thus consummated * * on December 27th, 1881, more than five years prior to the institution of this prosecution, when an indictment might have been found. * * This being so, the limitation on the right to institute a prosecution therefor began to run at the same time."

In *United States v. McCord, supra*, Judge Bunn said:

> "In a criminal case under the United States Statutes it is incumbent upon the prosecution to show that an offense has been committed within the three years immediately preceding the finding

of the indictment. * * It is conceded that the indictment could have been found in March, 1891; that the conspiracy to defraud the government was then formed by the defendants and various overt acts performed intended to effectuate its objects. If this be so, it is difficult to see why the statute did not then begin to run. Otherwise you would have a different period of limitation in conspiracies than what you have in other offenses against the government. which could not have been the intention of the law."

In *ex parte Black*, *supra*, Judge Quarles held, in the plainest language, that the statute of limitations runs from the first overt act, because that is the time when the right of action accrues, and the statute of limitations always dates from that time. He then says:

"If the illicit scheme is continued and new overt acts to carry it out occurred within the period of limitations, the pleader should charge a new conspiracy".

In *United States v. Black*, 160 Fed., 432, the Court of Appeals of the Seventh Circuit say, in speaking of the statute of limitations;

"Under section 1044, R. S., the indictment must be found within three years next after such offense shall have been committed, so that both the fact and date of the overt act upon which the offense is charged are of the utmost materiality upon the present issue. If either of these (overt acts) can be accepted *as the inception of liability under the charge*

of conspiracy, then their date is within this period of limitation".

In *Ware v. United States*, *supra*, the question presented was not one of pleading, as in the case at bar, but arose on the admissibility of evidence. The indictment in that case charged the formation of the conspiracy within three years, with suitable allegations of overt acts to effectuate its purpose. On the trial, proof was offered of the existence of the same conspiracy and of overt acts to effectuate it, outside of the three year period. This evidence was admitted against the objection of defendant, and on appeal this ruling was assigned as error. In the opinion of the Court of Appeals by Judge Sanborn, it is said:

> "Proof of the formation by the defendant and others more than three years before the indictment of such a conspiracy as that charged in the indictment under which an overt act has been done prior to the three years is insufficient to sustain the charge of a conspiracy within the three years".

If such proof is insufficient to sustain a charge of conspiracy within the three years, it is submitted that allegations in an indictment of the same facts are insufficient to allege one.

> "But in connection with evidence aliunde of the existence of the same conspiracy and of the defendant's conscious participation therein within the three years, it is competent evidence for the consideration of the jury in determining the issue presented by the indictment. An overt act committed by one of the alleged conspirators within the

three years pursuant to a conspiracy between him and the defendant formed and followed by an overt act more than three years prior to the filing of the indictment, without the defendant's consent or *agreement* within the three years to the continued existence and to the execution of the conspiracy, is incompetent to establish its existence and his participation therein within the three years."

This clearly means that if a new conspiracy, or a new meeting of minds or agreement took place within three years, followed by an overt act, the guilty parties could be prosecuted, not for the old, but for the new agreement.

Judge Sanborn's meaning is made more plain by his comments on the rule established in *United States v. Britton*, 108 U. S. 199, as follows:

"So that there is a *locus penitentiae* after the performance of each overt act and a presumption of the innocence of the defendant, and if after the performance of the first overt act a defendant abandons the design of the conspiracy, and the prosecution of the conspiracy and of the first overt act becomes barred by the statute, the overt acts of other conspirators within the three years in the performance of the old conspiracy, without the conscious participation of the defendant, ought not to charge and cannot charge him with the offense, because they fail to evidence his intent to violate the law within the three years."

And also by the following:

"The same rules of evidence govern the

trial and the decision of the issue, whether or not the defendant consented or agreed within the three years to the existence of the conspiracy and the subsequent execution of its scheme, which control the trial of the issue, whether or not the conspiracy was originally formed. Evidence must be produced from which a jury may reasonably infer the joint assent of the minds of the defendant and of one or more other persons within the three years to the existence and the prosecution of the unlawful enterprise. *Until such evidence is produced, the acts and admission of one of the alleged conspirators are not admissible against any of the others*, etc."

If, therefore, the same rules of evidence govern the trial of the new conspiracy, the same rules of pleading must apply; and as the existence of the new conspiracy cannot be proven by overt acts of any conspirator, so the new conspiracy cannot be alleged by alleging acts of any conspirator. Applying this test to the indictment in the case at bar, and we find nothing alleged tending to show that these defendants ever entered into any agreement between themselves or with others, except on September 1st, 1901, and on September 20th, 1901 (the date of the first overt act), the presumption of innocence arose in their favor, and if that presumption is to be overcome, it must be by appropriate allegation that at a subsequent date they again conspired, and this allegation must be contained in the charging part of the indictment, and not by way of allegations of overt acts by alleged co-conspirators, for allegation of what alleged co-conspirators did cannot convict or charge

the defendants with making the original agreements and is not even admissible until such agreement is otherwise proven.

From the dissenting opinion of Judge Phillips in this case, it is apparent that the Court of Appeals were of the opinion that the statute of limitations began to run from the first overt act, for it is there said:

> "*It is conceded* that the commission of the first overt act in furtherance of the conspiracy agreement put into operation the three years statute of limitations".

We commend this dissenting opinion to this Court.

In *United States v. Biggs, supra*, the charging part of the indictment is in the exact language of the case at bar, as follows: that the defendants,

> "on the 25th day of August, 1899, and at the several times of the committing of the several overt acts hereinafter in this indictment mentioned, and continuously at all times between the said 25th day of August, in the year last aforesaid, and the day of the presenting of this indictment, unlawfully did conspire," etc.

It then set forth eight overt acts on eight different dates. Judge Lewis held this was a statement of eight several conspiracies, and the indictment was duplicitous; but, assuming that but one conspiracy was had, he said:

> "Assuming that the indictment does not charge several conspiracies as above indicated, but that it was one conspiracy, continous from the formation on August 25th, 1899, to the presenting of the in-

dictment, we come to consider the plea of the statute of limitations. The first overt act in furtherance of the conspiracy is charged as of August 25th, 1899; and it is insisted by the defendants that if the indictment charges but the one conspiracy, that on the commission of that overt act prosecution could have been had, and that therefore, the statute of limitations began to run as of that date. Against this it is answered that under the doctrine in the Ware case every overt act 'with conscious participation' by the defendants in the unlawful combination works a renewal of the conspiracy. This may be conceded to be the clear holding in that case, but it is evident that that conclusion was there reached on a consideration of the rules applicable to evidence and to the particular proof then in hand, which is a very different thing from the rules applicable to pleading in charging a criminal offense."

Following the rule announced in *United States v. Owen*, *supra*, the court then held that if but one conspiracy was charged, the statute of limitations began to run with the commission of the first overt act to effectuate its purpose, and was then barred.

The case of *Commonwealth v. Bartilson*, *supra*, has sometimes been quoted as holding that an indictment alleging the formation of a conspiracy outside of the three year period followed by an overt act within that period states an offense, but it does not so hold. In that case the court said:

"A conspiracy is averred to have been formed on

the 20th of December, 1874. This was more than two years prior to the finding of the bill, and upon this ground the court below quashed the count. It was strongly urged, however, that inasmuch as it was averred in said count that the defendants had, in 'pursuance and renewal of said conspiracy,' committed divers overt acts specifically described in said count, the date of one of which, at least, was within the statutory period, there was a continuance and renewal of the conspiracy from time to time, and the statute was thereby tolled. This is plausible, but unsound. The offense charged was the conspiracy. According to all the authorities, the conspiring is the essence of the charge, and if that be proved, the defendants may be guilty. * * According to the first count, the offense was complete the 20th of December, 1874. The overt acts set forth do not constitute the offense. An overt act may or may not be unlawful *per se*. It is because of its relation to an unlawful combination that it becomes obnoxious to the criminal law. The averment that the conspiracy was renewed from time to time does not meet the difficulty. If it proves anything, it proves too much. The renewal of a conspiracy means to begin it again; to recommence it; to repeat it. From this it is apparent that each renewal is a new offense; a repetition, it is true, of a former one, but still an offense for which an indictment would lie. If, therefore, the overt acts were done or committed in renewal of the conspiracy of December

20th, 1874, they averred distinct offenses. It is a well settled rule of criminal pleading that distinct offenses cannot be joined in the same count. The difficulty in regard to this count arises merely from a mistake in pleading. *The date of the conspiracy should have been laid within the statutory period.* The Commonwealth must allege and prove a conspiracy within two years. If this cannot be done, the Commonwealth has no case. The pleader evidently felt the strain of this part of his case, so he introduced the averment that the overt acts were in 'renewal' of the original conspiracy. It was practically alleging an offense with a *continuendo*. It was an attempt to prove the existence of a crime within the statutory period by showing its commission outside of such a period, and that it had been continued down to a time within it. We think the indictment was properly quashed".

The case of *American Fire Ins. Co. v. State, supra*, has also been erroneously cited to the same proposition. In discussing the statute of limitations on demurrer to the indictment in that case the court said:

"If this indictment presented the original conspiracy as and when first formed, and that conspiracy was so originally formed two years before the finding of the indictment, the prosecution would, of course, be barred. Or, if treating this offense as composed of the original conspiracy, plus the first overt act done in pursuance of it and as completed when such overt act is done, then, if such overt act was done more than two years before the finding

of this indictment, in that case also, the prosecution would be barred."

In *Irvine v. United States, supra*, this precise question was presented, and squarely held that the statute of limitations begins to run from the moment the right to prosecute accrued. That was an indictment found against the defendant for wrongfully withholding pension money. There, as here, it was insisted, that so long as the money was withheld the crime was a continuing one. The trial court certified to this court the following questions: (a) Is the crime a continuous one down to the time of finding the indictment? (b) Does the statute of limitations constitute a bar to this prosecution, the indictment having been found September 15th, 1875 (five years after the first withholding)? The court said:

"There is in this but one offense. When it is committed, the party is guilty and is subject to criminal prosecution, and from that time also the statute of limitations applicable to the offense begins to run. * * The defendant pleads the statute of two years, a statute which was made for such a case as this: but the reply is, 'You have received the money; you have continued to withhold it these twenty years; every year, every month, every day was a withholding within the meaning of the statute'. We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that date the

statute of limitations begins to run against the prosecution".

If this offense consists of the conspiracy alone, and not of the conspiracy plus an overt act done to effect the object of the conspiracy, as held by this court in *United States v. Britton*, 108 U. S. 204, *Dealy v. U. S.*, 152 U. S. 539, 546, *U. S. v. Hirsch*, 100 U. S. 33, *Bannon v. U. S.*, 156 U. S. 468, and by nearly every trial court that has been called upon to construe section 5440, there is no escape from the logical conclusion that the statute begins to run when the right to prosecute for the conspiracy accrued, namely on the commission of the first overt act to effect its purpose; and, on the other hand, if the statute does not begin to run from the first, but from any other act, it is because, and only because, it is the overt act and not the conspiring which constitutes the offense.

An examination of the cases cited by counsel will disclose that in every case the court has been compelled to take the ground that the commission of the overt act was the offense, or, was conclusive evidence of a new conspiracy, thus making the act of one co-conspirator conclusive evidence as against the others of the existence of an otherwise unproven or unalleged conspiracy.

In *United States v. Green*, 115 Fed. 343, the court held that if a scheme to defraud was entered into at a time so remote that the *prosecution for acts then done* was barred, it would still be punishable under the statute, if overt acts were committed within the period of limitations. It should be noted in this case, however,

that the conspiracy charged was within the statutory period.

In *United States v. Bradford*, 148 Fed. 413, the whole decision is predicated upon the following statement:

> "It is well and fully settled that the commission of an overt act is *per se* a rewnal of the conspiracy."

In *United States v. Brace*, 149 Fed. 874, it is said:

> "The more reasonable view is * * to regard the conspiracy as a continuing offense, so long as the parties thereto *continued to perform acts to effect its object.*"

In *United States v. Barber*, 157 Fed. 889, Judge Quarles, after holding that, on removal proceedings, all that was required of an indictment was to clearly indicate to accused the nature of the offense with which they are charged, then said:

> "There can be no doubt that the indictment as framed clearly indicates to the accused that they did 'unlawfully, falsely, fraudulently and corruptly, in furtherance of the alleged conspiracy and to carry out and effect the object thereof, perform certain overt acts, as for instance,'" etc.

In other words, Judge Quarles, on first impression, thought the defendants were charged with having performed an overt act, rather than having conspired. On rehearing, and on August 20th, 1908, Judge Quarles reversed himself, holding that the indictment then before him (which was not the one at bar) did not warrant defendants' removal, and ordered them discharged. This latter decision was never reported.

In *United States v. Raley*, 173 Fed. 159, the court

simply followed the decision of the court of appeals of that circuit in *Jones v. United States.*

In *Jones v. United States*, 162 Fed. 417, the Court of Appeals adopted the rule that each overt act constitutes a separate crime, and say:

> "Where the conspiracy contemplated various overt acts, * * * then each overt act gives a new, separate and distinct effect to the conspiracy, *and constitutes another crime*".

In *United States v. Breese*, 173 Fed. 402, Judge Newman correctly charged the jury that if the conspiracy charged, which was within the three-year period, was found to exist, it would not be material that the same conspiracy was originated or instituted outside the three-year period, but in that case the jury was not authorized to convict unless they found a meeting of the minds and an agreement entered into within the three-year period.

In *United States v. Bradford*, 152 Fed. 617 the Circuit Court of Appeals affirmed the ruling, and adopted the reasoning of the trial court in *United States v. Bradford*, 148 Fed. 413.

But, assuming that the statute does not begin to run until the performance of the last act to effectuate its purpose, and the decision of the lower court must be affirmed, because the acts alleged within a period of three years before April 14, 1905, when the indictment was filed, all occurred subsquent to the passing of the title from the United States to the lands in question

and after the purpose of the conspiracy had been consummated.

United States v. Black, 147 Fed. 832.

United States v. Black, 160 Fed. 432.

United States v. Biggs, 157 Fed. 264.

Lonabaugh v. United States, 179 Fed. 476; Advance Sheets, September 8th, 1910.

The indictment shows that the applications of the various entrymen to purchase the land in question were made between August 17th, 1901 (before the conspiracy is alleged to have been formed) and June 8th, 1904, and that the final proofs and final payments were made by the entrymen on various dates between November 13th, 1901, and September 20th, 1904. The Timber and Stone Act provides that upon payment of the purchase money etc., and the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon, so that by September 20th, 1904, every act which could have been done by any of the alleged conspirators had been performed, the patents issued, and the government had been defrauded, if at all, out of the title to and possession of its lands. Whether the guilty parties thereafter kept the land or conveyed it to their co-conpirators, or to others, was immaterial. The purpose of the conspiracy had been completed, and assuming that the statute then began to run, this case was barred on September 20th, 1907, seven months before the indictment was filed. On this question all the authorities agree.

In *Black v. United States*, 160 Fed., 432, the evidence established that final proofs and payments had been

made by all the entrymen who were alleged to have made entries as agents of the defendant more than three years before filing the indictment. The only act alleged or proven which occurred within the three-year period was the payment by the defendant to the entrymen of their stipulated compensation for assisting in the fraud. In discussing as to whether or not such payment could be deemed an act to effect the purpose of the conspiracy, the Circuit Court of Appeals for the Seventh Circuit, by Seaman, Circuit Judge, said:

> "Whatever may appear from the indictment as to the relation of these payments and of the payees to the alleged conspiracy, the proof of the fact and date of completion of entries and issuance of certificates of purchase establish beyond controversy that such payment (to the entrymen) was made, not as an act to effect the object of the conspiracy to defraud or to procure service to that end, but in settlement or payment for a pre-existing service or obligation; that such service was necessarily completed, and the obligation incurred prior to the date of the last certificate of purchase; so that neither form nor date of the payment (to the entrymen) so made, can serve as an overt act for charging conspiracy under section 5440, and thus evade the statute of limitations. * * The fact that final entries were made and purchase certified is presumptive, but not decisive, under the Timber and Stone Act, that all proceedings or service required to be performed to that end by either or all of the parties named as conspirators or defendants had been

entirely rendered when these certificates of purchase were issued, in so far as concerns the conspiracy to defraud the United States. * * Therefore, no occasion remained for further action on the part of either of the conspirators or other persons engaged to effect that object; and no opportunity was open to either conspirators for immunity under the *locus penitentiae* provision of section 5440. * * We are of opinion, therefore, that the violation of section 5440 was committed and completed before the certificates of purchase were issued, and that no overt act is charged within the period limited by section 1044, however the averments of the indictment are considered."

"The contention that the object of the conspiracy was not completed until a patent was issued and delivered is untenable, as we believe, in any view of the effect of the final entries and certificates of purchase thereof, for the two-fold reasons that violation of the statute in no way depends upon the success of the conspiracy and became complete (as before stated) when the final step was taken on the part of the conspirators. What course has been or may be adopted by the land office or other departments in reference to these entries, or in issuing or withholding the formal patents thereon is plainly immaterial under this indictment. The general doctrine with reference to public lands subject to entry appears to be settled that a tract ceases to be subject to the disposition of the United States when it is entered, paid for and so certified

by the land office, although no patent has been delivered. Cornelius v. Kessell, 128 U. S. 456; United States v. Schurz, 102 U. S., 378."

In *United States v. Black*, 147 Fed. , Judge Quarles, in an able opinion, points out the necessity of distinguishing carefully between acts tending to effectuate the conspiracy and those transactions between the conspirators themselves, which have no such effect, and held that the division of the spoils between the conspirators could not, under the law, be deemed an overt act.

In *United States v. Biggs*, 157 Fed. 264, the precise question here presented was passed upon by Judge Lewis. In that case the indictment alleged a conspiracy in the exact language of the indictment now before this court, followed by eight overt acts, seven of which were outside of the three-year period. The remaining act relied upon was the conveyance by William Barth (to whom the entrymen conveyed in trust for the corporation), to the corporation named in the charging part, for whose benefit the land was alleged to have been acquired. In passing upon the legal sufficiency of such a deed to toll the running of the statute of limitations, Judge Lewis said:

"It is contended for the government, and authorities have been cited for that purpose, that if the overt act is charged to have been to effect the object of the conspiracy, it becomes a question for the jury and not for the court to say whether such overt act was done to effect the unlawful purpose; but in those cases it does not affirmatively appear

from the charge that the overt act could not have had such an effect, while here, I think, it does appear that this overt act could not, by any possibility, have been done to effect the object of the conspiracy. Bearing in mind the offense charged, to wit: a conspiracy to defraud the United States, is it not apparent that the mere execution of the deed by Barth to the lands could have no such effect? I think it is".

In *Lansbaugh v. U. S.*, 179 Fed. 476, the Circuit Court of Appeals for the Eighth Circuit reversed the decision of the lower court, reported in 158 Fed. 314, under which latter decision the present indictment was drawn. The action was for conspiracy to defraud the United States by means of fraudulent entries of public lands. The fraud was to be effected by means of entries, apparently regular, but actually fraudulent, in that the entries were made for the use and benefit of a corporation. The entries actually were secured by false proofs; the entrymen then delivered to the corporation warranty deeds for the lands entered by them, with one exception, and he conveyed to an individual grantee designated by the defendants. Later, acting upon the false proofs submitted, patents were issued and still later delivered and recorded. After patent, the defendant caused the individual grantee to convey to the corporation, and all deeds to be recorded. The date of the several acts recited were such that no overt act occurred within three years of the finding of the indictment, unless the issuance of the patents, or some of the acts subsequently done by one or more of the

defendants, can be so regarded. On this state of facts the court said:

> "Of the issuance of the patents little need be said. It was not the act of one or more of the conspirators, but of the officers of the land department. * * And while it doubtless was induced by what the conspirators had done in giving to the entries the lawful appearance, when they really were fraudulent, the fact remains that all that was done by the conspirators in that connection occurred more than three years before the indictment was found."
>
> The subsequent acts (deeds to the corporation) are not open to the same objection, for they were the acts of one or more of the conspirators. But were they done to effect the object of the conspiracy; that is, to defraud the United States of the possession and title? This depends upon whether or not that object had been effected before these acts were done. If it had, the answer must be in the negative." * *

After citing and quoting from various cases, the court continued:

> "Applying these decisions to the present case, it is plain that the title passed from the United States when the patents were executed. * * And recalling what has been said about the possession and the right of possession, we think it also is plain that the object of the conspiracy was affected when the title passed from the United States, and there-

fore, what was done thereafter was not done to effect that object."

"But it is contended that the conspiracy was not limited to defrauding the United States of the lands, but included the transfer of them to the corporation, and that until both of these things were done the object of the conspiracy was not effected. * * Section 5440 does not interdict all conspiracies, but only those whose object is either 'to commit any offense against, or to defraud the United States in any manner,' and then only when one or more of the conspirators do some act to effect the object of the conspiracy. It is not enough that the conspiracy be directed to the attainment of some unlawful object, or to the attainment of some lawful object by unlawful means. It must be directed to the attainment of one of the objects specified. Nor is it enough that the overt act be directed to the attainment of some other object; it must be directed to the attainment of the object which brings the conspiracy within the interdiction; and when that object is attained, 'the object of the conspiracy' in the sense of the statute is effected. In this view of the statute the contention must fail. The conspiracy came within the interdiction because it had for one of its objects the defrauding of the United States, and that object was effected when, as a result of the deceit practiced upon the officers of the land department, the lands were patented to entrymen who were not entitled to them.

considering the antecedent agreement in pursuance of which the entries were secured."

By stipulation of the parties the decision and ruling made on defendants' plea to the fourth count shall be deemed to have been made on defendants' demurrer to the same count (71 R., 42 T.), and the defendants' demurrer to the fourth count was properly sustained;

First—because the charge that the defendants conspired on September 1st. 1901, "and at the time of the committing of the several overt acts hereinafter in this indictment set forth", followed by eighty-four alleged overt acts, must be deemed to be an allegation of that many several offenses, and is therefore duplicitous.

United States v. Biggs, 157 Fed. 264.

Second—none of the acts within or without the three year period can be said to be acts to effect the object of the conspiracy, as it is alleged in the charging part of the indictment. It charges that defendants,

> "on the first day of September, * * did unlawfully conspire, * * knowingly and corruptly to defraud the United States out of the use of and title to large tracts of timber lands, * * by unlawfully inducing persons to apply for and enter said lands, * * upon an understanding and agreement between defendants and said persons so to be induced to enter said lands, '*which agreement was to be had, made and entered into, * * prior to and at the time of the first application to enter said lands of said persons so to be procured*, 'that the title

should inure to defendants, who would point out the lands and pay the expense," etc.

It is well settled that the substance of the agreement alleged to constitute the unlawful conspiracy must be set out with particularity, including the means which the parties had decided upon to effect the purpose. *Pettibone v. United States*, 148 U. S. 197; *United States v. Hess*, 124 U. S. 483; *United States v. Crookshank*, 92 U. S. 542. In reponse to this rule the pleader has stated that, as a means of defrauding the United States, the conspirators agreed among themselves that they would induce various people to enter these lands, and that before each one made his first application they (the conspirators) *would* make an agreement with each entryman of the kind specified. This proposed agreement, which the conspirators had agreed between themselves was to be made with the entrymen was the *means* by which title was to be procured from the government.

Looking, now, to the overt acts alleged, and they must be such acts as the Court can see would tend to accomplish the desired result *by the alleged means:* Tested by this rule, and none of the alleged overt acts are sufficient. It is nowhere suggested that such *proposed* agreement was ever made with a single entryman, and it is not alleged that a single entryman procured his title from the government after having made such an arrangement with these defendants, or anyone else. The allegation relative to the overt acts, "that the defendants unlawfully induced and unlawfully procured," is not sufficient. What the pleader may have

thought to be unlawful may, or may not, have been so. But even if unlawful, it certainly could not be construed to be an allegation that they induced them to make the entries by first making the proposed agreement with them. The "means" alleged in this indictment was a *proposed* agreement to be made with each several entrymen *sometime in the future*. There is not a single overt act alleged even tending to show that any person charged as a conspirator made or attempted to make such proposed agreement with a single entryman. There is not, therefore, anything in this indictment to show that any of the alleged conspirators ever attempted to carry out the agreement it is alleged they made or attempted to procure government lands by the *unlawful means* which the charging part says was agreed upon. To illustrate, does the allegation that the defendants induced George S. Long to execute a deed to the Barber Lumber Company on April 10th, 1905 (33 R., 22 T.), indicate an intention to effectuate the purpose of the conspiracy to defraud *by the means alleged to have been agreed upon?* In other words, does it tend to show, or as a matter of law can it be said to have been calculated to show, an intention to make the proposed agreement with the entrymen? Do the allegations of overt acts, to the effect that the defendants induced the sixty-nine entrymen to make original entries, and thereafter make final proof on their several tracts, evidence or indicate an intention on the part of any alleged conspirator to defraud the government *by the means alleged in the indictment?*

It is not enough that the alleged overt acts might be said to effectuate the *purpose* of conspiracy, but such purpose must be effected by the *means* which the conspirators agreed upon, which, in this case, was the making of several contracts with each entryman prior to his original application to purchase.

This is the one means alleged by which the fraud was to be consummated, and yet we find no allegation that such contract was ever made, or that any of the conspirators ever took the first step looking to the making of such a contract.

It was suggested in the court below that the conspiracy here charged had for its purpose defrauding the United States by two separate methods. First, by depriving the Government of its title by illegal means, and second, by vesting title in the conspirators, and their corporation, to more than one hundred and sixty acres in evasion of the statutory prohibition.

This contention was based primarily upon the proposition that the rule announced in the Britton case, and ever since followed, that the offense is the conspiracy alone, is erroneous; that the offense is in making the entries, or in acquiring title under the Timber and Stone Act to more than one hundred and sixty acres; or, stated differently, that the offence is in *defrauding* the government, and not in *conspiring* to defraud it. From these premises it was ingeniously urged that every time a new fraud was commited, that is, every time a fraudulent entry was made, or one of the conspirators acquired more than one hundred and sixty

acres, a new offense was committed; and that under this view, the final deeds from Rand, Long and Palmer to the corporation were overt acts, tending to effectuate the purpose of defrauding by the second method mentioned. The following propositions sufficiently answer this contention in this case:

First. The indictment does not charge the defendants with conspiring to acquire more than one hundred and sixty acres, but "to defraud the United States of America out of the possession and use of and title to divers large tracts of timber lands of the United States".

Second. The defendants are charged with *conspiring*, and not with *defrauding* the United States in any manner whatever.

Third. The crime of conspiring to defraud cannot be converted into two crimes, because it was contemplated to defraud the government by two separate methods.

Fourth. The law does not prohibit any person, or association of persons, from acquiring more than one hundred and sixty acres from any person but the government itself.

Fifth. The question of whether or not the conveyances by Rand, Long and Palmer to the corporation were, or were not, such acts as would toll the statute of limitations, depends upon the relation of such acts to the unlawful agreement, which it is claimed constituted the conspiracy. That unlawful agreement, it is conceded, was formed September 1st, 1901, and was never modified or changed. Referring now to that

agreement, and we find that the conspirators agreed to nothing except that they would make an agreement with each entryman, *before he made his original application to purchase*. They had therefore done all that they agreed to do (if they did it at all), when the last application was filed, which was on June 8th, 1904. If they carried out the conspiracy and made the proposed agreement with this last entryman (which is not alleged), then is it not clear that the conspirators had done all that they agreed to do, and all that the original unlawful agreement contemplated. If anything further was done, it must have been pursuant to some new, modified or enlarged agreement, which is not alleged. Certainly, the execution of deeds by Rand, Long and Palmer, who were not even entrymen, subsequent to April 14th, 1905, cannot be said to have been acts done to carry out the original agreement of September 1st, 1901, which, by its very terms, was to expire when the last application was filed.

Sixth. But, even conceding that the purpose of this conspiracy was to vest in one person, or association of persons, more than one hundred and sixty acres in violation of the statutory limitation; and further conceding that the purpose of the conspiracy was not completed until that was done, and the decision of the lower court must be affirmed, because it affirmatively appears that prior to April 10th, 1905, the conspirators had procured all of these lands to be deeded from the entrymen to either Rand, Long or Palmer, and that as early at least as April 10th, 1905,

Rand, Long and Palmer each held title to several thousand acres of the land in question, (32, 33, R. 21, 22 T.) The indictment alleges that Long deeded to the corporation April 10th, 1905, and that prior to that date all of the entrymen had conveyed to Palmer, Rand or Long.

For the reasons herein stated, it is respectfully submitted that the writ of error should be dismissed; or if this Court has jurisdiction, that the ruling and decision of the trial court should be affirmed.

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Clerk.

IN THE

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OCTOBER TERM, 1939.

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THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JAMES T. BARBER AND SUMNER G. MOON,
DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

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I.

This court has no jurisdiction.

a. Because the plea of defendants was filed as a plea in abatement by consent of all parties and of the court, and the court minutes show a mere dismissal of the cause, not a discharge of the defendants without day, as would be the case under a plea in bar.

b. For reasons stated in our original brief, a plea in abatement is the proper method of raising the question, in a

prosecution for conspiracy, that the indictment does not allege an overt act, which is a prerequisite to the right of the Government to prosecute. The plea is in the nature of one alleging that the action is prematurely brought.

* * *

II.

The only question before this court on this record, so far as the defendants' plea is concerned, is the sufficiency of such plea on the Government's demurrer thereto. By such demurrer the facts set up in the plea are admitted, and this presents the question as to whether or not such plea, as a matter of law, constitutes a defense. If so, plaintiff's demurrer thereto was properly overruled, and, because of plaintiff's failure to reply or plead over, judgment was properly entered, dismissing the cause.

For the sufficiency of such plea see:

People *vs.* Roe, 5 Park Crim. Rep.

Bishop's Directions and Forms, sec. 1046, note 2.

III.

Reversing the order of discussion of the next two propositions, as they are contained in the Supplemental Brief of plaintiff in error, we will herein discuss, first, the effect of an act committed within three years to effect the object of a conspiracy which was formed and followed by an overt act, outside the three-year period.

The commission of an overt act in furtherance of a conspiracy made complete, and subject to prosecution by the performance of an overt act, outside the three-year period, does not prevent the bar of the statute of limitations.

The Government contends "that the offense consists in the formation of the unlawful agreement, or, in other words, the hatching of the plot, and that an overt act renews the conspiracy whenever and wherever such overt act is committed, and all parties may be prosecuted for the new conspiracy at any time within the statutory period after the renewal."

The correctness of this proposition is the question now presented.

This contention concedes that the offense is the formation of the original unlawful agreement; it concedes that upon the performance of an act to effect the purposes of such unlawful agreement the right to prosecute arises and is complete, and that the statute of limitations then begins to run against such offense; but it is insisted that, as each original conspirator makes his co-conspirators his agents for all purposes relative to the conspiracy, he must be deemed to have authorized such agents to act for him for the purpose of renewing the original agreement whenever an alleged co-conspirator performs an act to effectuate its object.

In other words, the Government contends that each overt act performed by any one of the conspirators renews the offense as to all, and that an allegation of an overt act is equivalent to an allegation of a new or renewed meeting of the minds for unlawful purposes. This doctrine concedes the correctness of the reasoning of Judges Bunn, Deady, and Quarles, that the statute runs from the performance of the first overt act, but seeks to avoid the effect of such reasoning, by insisting that each overt act amounts, as a matter of law, to the making of a new contract or a new conspiracy.

upon which, again, the statute would begin to run from the next overt act, which would again constitute a new conspiracy, and so on, indefinitely.

It must be remembered that, as the issues are presented in this court, the demurrer and special plea of the defendants in error admits all that is properly pleaded in the indictment, and nothing more. Hence, to determine what the facts before this court are we must determine, as a question of pleading, what is properly pleaded.

The Government concedes that there is no direct allegation of the formation of a conspiracy at any time, except the original one of September 1, 1901, but urges that allegations of overt acts are the equivalent to an allegation of a new or renewed agreement.

The following propositions demonstrate the fallacy of this argument:

1. If each overt act is, *ipso facto,* a renewal of a former illegal agreement, then each such act is a new offense and the subject of separate prosecution, and should be so pleaded.

2. If an allegation of an overt act is equivalent to the allegation of a new agreement, then proof of such overt act would be proof of such new meeting of the minds, which would violate the universal rule that, until the conspiracy is otherwise shown, the acts of one conspirator are not admissible in evidence as against the others.

U. S. *vs.* Ware, 154 Fed., 590.
6th A. and E. Encyc. (2d ed.), 867-8, and notes.
2 Wharton Crim. Law, sec. 1406.
U. S. *vs.* Goldberg, 7 Biss., 175.
Logan *vs.* U. S., 144 U. S., 263.
Brown *vs.* U. S., 150 U. S., 93.
Clune *vs.* U. S., 159 U. S., 590.

3. It violates those other well-established rules of criminal pleading, that an indictment must charge the facts with sufficient particularity, without referring to the overt act, to

enable the court to determine the lawfulness or unlawfulness of the agreement; and that a person cannot be charged with a crime by alleging conclusions of law.

Britton *vs.* U. S., *supra.*
Cruikshank *vs.* U. S., 92 U. S., 542.
Ness *vs.* U. S., 124 U. S., 483.
Pettibone *vs.* U. S., 148 U. S., 203.

4. It violates the universal rule that the statute of limitations always begins to run with the inception of liability, for it concedes that the right of the Government to prosecute for the conspiracy here alleged accrued outside of the three-year period.

5. It is a universal rule that the bar of the statute of limitations is as complete a bar as the plea of *autrefois convict* or *autrefois acquit* (154 Fed., 587); and yet this doctrine, if followed, would permit defendants to be tried, prosecuted and punished for a conspiracy concededly barred by the statute, for counsel admit that there can be but one prosecution for one conspiracy, regardless of the number of times such conspiracy was renewed by the commission of overt acts.

6. As this indictment charges 84 different overt acts, at least several of which are claimed to be within the three-year period, it would be held under this doctrine to state that many renewals, and if defendants were put to trial upon such an indictment they would be tried for as many offenses as there are overt acts alleged to have been committed within the three-year period.

7. This doctrine amounts to this: That an overt act is *conclusive evidence* of a new agreement, and then attempts to charge a crime by charging the evidence of it.

8. But if we were to concede that each overt act is evidence of a new conspiracy the result in this case must be the

same, for the indictment industriously alleges that every act was done pursuant to *said conspiracy* of September 1, 1901, thus in terms negativing the formation of any new agreement.

9. It violates the rule that a presumption of innocence follows each overt act, and makes each such act serve both as conclusive evidence of the conspiracy and as an act to effectuate it.

10. In concluding this branch of the argument, we respectfully urge on this court the reasoning of Judge Phillips in his dissenting opinion in the case of Ware *vs.* U. S. (154 Fed., 580), in which he says, in substance: "Words are of little moment here. Whether it be deemed a new or a renewed agreement, it comprises but one offense; and under the plain language of section 1044 the right of the Government to prosecute for that offense accrues when the first act to effectuate it is performed, and the statute begins to run at that time."

11. Counsel likens a renewal of a conspiracy to giving a new note "to prevent the statute from running on an old one." To have such effect the new note must be given *before* and not *after* the statute has run.

IV.

If the doctrine that each overt act constitutes in law a renewal of the original agreement and a new offense, is correct, then this indictment is clearly duplicitous, as held by Judge Lewis in Biggs vs. United States, 157 Fed., 264, and defendants' demurrer to the indictment was properly sustained.

It must be remembered that in this case the ruling of the trial court on the special plea is to be deemed made on defendants' demurrer to the indictment. (See stipulation, 171 R., 42 T.)

V.

It was not error for the court to hold that the object of the conspiracy alleged in the indictment was accomplished when the title to the lands was divested out of the United States, nor was it error to hold that all the acts alleged to have been performed within the three years were not and could not be held to be acts to effect the object of the conspiracy charged.

The argument of counsel is, briefly, this: That the object of this conspiracy was to vest in the conspirators and their co-conspirators the title to more than 160 acres of land, in violation of the statute; that such object was not attained until such prohibited amount of land was so vested; and that, therefore, the deeds from the entrymen to Rand, Long, and Palmer, and from them to the corporation, were acts "to effect the object of the conspiracy." It is conceded by counsel that, after that "object" is attained, no subsequent act can be deemed an overt act.

The only question, therefore, on this branch of the case is: Were the deeds from Rand, Long, and Palmer to the corporation "acts to effect the object of the conspiracy" within the meaning of section 5440?

We contend that such deeds cannot be deemed overt acts for the following reasons:

1. This indictment, unlike that in the Biggs case and in the Lonabaugh case, does not charge that the object of the conspiracy was to evade the 160-acre limitation of the Timber and Stone Act, but simply charges the object to have been to defraud the United States "out of the possession, use of, and title to divers large tracts of timber lands of the United States" (describing them). It then proceeds to allege the *intent* of the conspirators to profit personally by

the fraud, and by means of a corporation to be organized, and "ultimately to obtain the transfer of the title to said lands to said corporation."

The *intent* or *purpose* of the conspirators in making the unlawful agreement is not material. It is the agreement to defraud which constitutes the prohibited conspiracy, and this court has repeatedly held that the agreement must be set out in full, so that the court can determine without reference to the overt acts whether or not it is unlawful (Britton *vs.* U. S., *supra*). It is not required that the *intent* or *purpose* which prompted the accused to become a criminal be set out, which would be mere surplusage.

Here it is charged that the defendants conspired "to defraud the United States out of the possession and use of and title to certain lands." That is the material charge, and that is followed by alleging the means to be employed, which were, in effect, to "induce the entrymen to make entries under agreements which are prohibited by the Timber and Stone Act."

We contend that the unnecessary and immaterial allegations of what the defendants intended or purposed doing with the lands, after the Government had been defrauded by the means agreed upon, cannot enlarge the scope of this conspiracy.

Counsel is in error in stating that this question was not raised in the court below. It was fully argued and passed upon. The memorandum opinion of the trial court is no part of this record, was not filed until long after this writ of error was issued, and was then filed in the lower court only because counsel for defendants requested the court specifically to pass upon the one question therein referred to. Many other questions (such as the duplicity of the indictment, its failure to state an offense, etc.) were argued on the demurrer to the indictment, which demurrer, as well as the special plea, was sustained.

2. But, conceding that the fraud here alleged consisted in evading the land laws of the Government, rather than defrauding it of its property, the result is the same.

Adopting counsel's construction of the indictment, and the conspiracy therein stated contemplated evading the land laws in two ways:

(*a*) By inducing entrymen to enter lands nominally for themselves, but actually for the conspirators; and

(*b*) By vesting in one corporation more than 160 acres. Clearly the first method was complete when the title passed and the provisions of the Timber and Stone Act (which prohibit any one to make entry for the benefit of another) had been successfully evaded. This being true, the object of the conspiracy—that is, to defraud the United States by evading its laws—had been then completed. The crime of conspiring to defraud cannot be made into two crimes because it was intended to defraud by two different methods. The conspiring, not defrauding, is the crime charged.

Again, it appears from the indictment that the entrymen deeded to Rand, Long, and Palmer (dates not given), and that *thereafter*, viz., on April 10, 1905, Long deeded to the corporation, thus showing that all the lands were vested in these three persons prior to April 10, 1905 (Record, pp. 32-3). The word "thereafter" clearly refers to what is alleged immediately preceding, namely, that the entrymen deeded to Long, Rand, and Palmer. If it does not, there is nothing to show when the deeds from the entrymen were executed, and this court cannot assume they were made within the three-year period.

3. But the whole question as to when the "object" of this conspiracy was consummated (assuming such object to have been to evade the 160-acre limitation) is settled in this case by the admission of counsel in his supplemental brief, as follows:

> "It is alleged that on April 10, 1905, the conspirators induced Long to execute a deed to the Barber Lumber Company. * * * This occurred three years and four days before the finding of this indictment, and it may be assumed that the deeds from the parties who conveyed the lands entered by them to Long were executed prior to that date."

It is thus conceded that several thousand acres of this land had been procured from the Government, and the title successfully vested in this corporation more than three years before this indictment was filed.

Did not this complete the object of the conspiracy?

Had not the 160-acre limitation of the Timber and Stone Act been at that time successfully evaded?

Would such an evasion have been more fully effected by acquiring additional lands?

Was not the "policy of the law" as fully thwarted when 5,000 acres had been vested in the corporation as when 50,000 acres had been so vested?

The theory of the Government now is that the fraud consisted in evading the law and violating the Governmental policy with reference to its lands, and not in causing pecuniary loss? If so, the extent of the acreage becomes unimportant. If this were a prosecution for *defrauding* the Government, each separate evasion might constitute a different offense. But this is a prosecution for *conspiring* to defraud. The question is: When was the contemplated fraud (evasion of the law) completed? We submit that the above admission and the allegations of the indictment which made such admission necessary fixed that date prior to April 10, 1905, and outside the three-year period.

4. Again, counsel concedes that merely recording deeds was not an overt act, and in his Supplementary Brief relies upon the deed from Palmer to the Barber Lumber Company of May 27, 1905; Palmer to the Barber Lumber Company

of June 28, 1905; deed from Palmer to the company of January 2, 1905, and the deed from Rand to the company of July 7, 1905. It will be noted that as to these specific acts the defendants in error, Barber and Moon, are not alleged to have taken any part. The allegation is that Albert E. Palmer, with the "knowledge and consent," etc., of James T. Barber, made the deeds in question. It is well settled that mere passive acquiescence in acts to effectuate an alleged conspiracy are not sufficient to charge the accused.

Lancaster *vs.* U. S., 44 Fed., 896.

5. For further reasons why the acts alleged within the three-year period cannot be held to be within the statute of limitations we respectfully refer to the cases cited in our original brief, page 26.

6. In concluding this branch of the case we desire to call attention again to the fact that there is no allegation in this indictment to the effect that a single entry was made pursuant to any unlawful agreement with the defendants, or that a single step was taken to make such agreement with a single entryman. In U. S. vs. Biggs (211 U. S., 507) the indictment in express terms charged that the purpose of the conspiracy was to evade the 160-acre limitation. The Attorney-General made the same argument in that case as is now made here. In that case this court held that failure to show an unlawful agreement made at or before the original application to purchase the land by the entryman was absolutely fatal, and that, in the absence of such allegation, subsequent acts showing the intention to vest in one person more than 160 acres did not state an offense. In this case the failure to allege the making of such an agreement was strictly in accordance with the facts.

In U. S. *vs.* Barber Lumber Co. (172 Fed., 948) the case of Keitel *vs.* U. S. and the Trinidad Coal Company case

were discussed and held inapplicable to the facts there proven and here alleged, and it was there held that the Government had failed to prove (as here it has failed to allege) that a single one of these entries was made pursuant to any agreement by which the title should inure to the benefit of these defendants, to the Barber Lumber Co., or to any one else.

For the reasons stated here and in our original brief we respectfully submit that the judgment appealed from should be affirmed.

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